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WISCONSIN REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

FEBRUARY 27 — APRIL 27, 1900.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

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IN MEMORIAM.

DEATH OF JUDGE JOHN R. BENNETT.

On the 12th day of February, 1900, Mr. B. B. Eldredge of Janesville presented the following

Memorial of the Bar of the Twelfth Judicial Circuit.

May it please the Court:— We have been commissioned to present to the court a memorial of the life, character, and service of JOHN R. BENNETT, late judge of the Twelfth judicial circuit of the state of Wisconsin. We undertake the discharge of this sad duty doubting our ability to portray his diversified mental characteristics and vigorous individuality.

The subject of this commemorative sketch was born in Rodman, Jefferson county, New York, on the 1st day of November, 1820. His father and mother were natives of the state of Connecticut, being descended in direct line from Puritans settled in that part of our country at an early date. His parents, thoroughly imbued with the true American characteristic spirit of liberty and progression, early migrated to and settled in Jefferson county, New York, an unbroken and sparsely settled region, where the boyhood of our subject was largely spent in assisting his parents to clear a farm and make a home at the place of his nativity, and where he throve to noble manhood, revering justice and loving liberty.

Having attained proficiency in the branches of learning taught in the district schools of his native town, he began a higher grade of student life at the Black River Literary and Religious Institute of Watertown, New York, where he qualified himself for teaching, at which he was engaged at intervals during several years. In 1844 he entered upon the study of law under the supervision of W. W. Wager, Esq., at Brownsville, New York, for a brief period, and thereafter continued such study at Sacket's Harbor, New York, under the direction of D. N. Burnham, Esq., till in May, 1848, when he was admitted to practice in the courts of New York.

Being endowed with rare mental qualities, a retentive memory, and high conception of the noble and beautiful in literature, he ceased not during his many years to enrich his mind by study and reflection, and

his erudition, though not of the university order, became nevertheless remarkable. In his public utterances upon the rostrum or at the bar his rhetoric was just and forcible — didactic rather than ornate,— and in manner and by argument he sought to convince and satisfy rather than move his audience by sudden impulse, and on such occasions he drew freely on the best authors on positive science and in literature for materials to solve the problem under consideration, and for paradigms to attract and rivet the attention of the most obdurate.

In the family circle he was a gentle moving spirit and guide; in the social circle of relatives and most intimate friends he was ever a welcome and inspiring element; and at the more promiscuous assemblage where kindly mirth, playful sallies of wit, and repartee are possible, he was at his best and greatly admired. His love of the *fine arts*, in its widest sense, and all athletic and field sports, was a distinct feature of his individuality, which no personal deprivation would induce him to forego.

On the 28th day of November, 1844, at Homesfield, New York, JOHN R. BENNETT married Elsie L. Halloway, a woman of gentle manners and discriminating mind, and this happy nuptial band had continued for nearly fifty years when severed by the decease of Mrs. Bennett on the 28th day of May, 1893, at their home in Janesville, Wisconsin.

In October, 1848, Mr. BENNETT came to Wisconsin and located at Janesville in the practice of his chosen profession. His ability and geniality soon opened the doors and hearts of those at his adopted western home, and they installed him in their confidence and love, which he maintained to the last. And by his discriminating and analytic powers and capacity to combine his reflections and conclusions in action and language, he took high rank as a trial lawyer and advocate; which facts were recognized throughout the state.

In 1862 he was elected district attorney for Rock county, Wisconsin, and served in that capacity during two consecutive terms with rare ability, fidelity, and integrity. Criminals, whether of high or low estate, were alike to him as respects the meting of justice to each. During this latter period he maintained his former clientage and his practice till he was appointed judge of the Twelfth judicial circuit of the state of Wisconsin, to succeed the lamented Judge HARMON S. CONGER, after having been elected to that office in April, 1882; and afterwards he was re-elected in April, 1888, and again in April, 1894. And in truth it may be said of him that he died in the discharge of the duties of this responsible trust.

He came to the bench in the maturity and strength of his manhood, bringing to the work devolved upon him, and to the fulfillment of the great confidence reposed in him by an appreciative, considerate, and generous people, high purpose and wealth of knowledge. And he as-

sumed the dispatch of the duties and great responsibilities of the position as the consummation of his life ambition, and with courage and persistent assiduity met every obstacle.

In many respects he was an ideal judge. He was the enemy of trickery, and technicality met with no favor when urged to evade or retard justice; he was the friend and guide, so to speak, of the young practitioner of law, and the equal and co-worker of the more astute.

After the statement of a case before him his versatility and retentive memory enabled him during the progress of the trial or hearing to keep on a level with every question raised and the many-sidedness of each proposition presented; his rulings were concise and comprehensive, and generally just, and his instructions and charges were models of clearness and power. And his native courtesy and love of judicial fairness and open-handed justice to fullness moved and guided him in his work at the bar and upon the bench.

Judge JOHN R. BENNETT, with his mind aflame to the last, died at his home in Janesville, Wisconsin, on the 9th day of June, 1899. And the members of the bar were stricken with grief as if each had suffered a personal loss.

B. B. ELDREDGE,
WM. RUGER,
HARLOW PEASE,
P. J. CLAWSON,
Committee.

Mr. Eldredge then said:

May it please the Court:— In behalf of the members of the bar of the Twelfth judicial circuit of this state, I move this court that the memorial presented on the death of JOHN R. BENNETT, late judge of said circuit court, be entered upon the records of this supreme court and published in its reports,— an enduring testimonial of his ability, integrity, and great worth.

On behalf of the court Mr. Chief Justice CASSODAY responded as follows:

I have known Mr. BENNETT ever since I have been a resident of the state — over forty-two years. At the time I came to Janesville he was at the head of one of the leading law firms of that city — Bennett, Sloan & Patten — and had then been in practice in the state for nine years, and had previously been connected in business with three other lawyers, including Charles S. Jordon, then one of the most brilliant and able young lawyers in the state. Forty-one years ago last November the firm of Bennett, Sloan & Patten was dissolved, and on the same day Mr. Bennett became the head of the new firm of Bennett, Cassoday &

Gibbs. He brought to that firm an enviable reputation as an adroit, skilful, able, and successful jury lawyer, which brought to the firm a large number of litigated cases, especially those triable by jury.

Judge GIBBS was the oldest member of the new firm, and had been out of practice for some years; but he owned the only abstract of titles in Rock county, and had for years been engaged in loaning money, and was one of the most valuable members of the firm, especially in bringing in paying business. That firm continued for seven years, and during all that time was crowded with work.

The retirement of Judge GIBBS to his elegant farm at Whitewater, and other business considerations, led to the dissolution of the firm, but the friendships formed during the seven years of partnership never abated for a moment.

For a few years after the dissolution of the firm, Mr. BENNETT and I were frequently retained upon the same side; but later and for several years we were generally retained on opposite sides. Thus, as partner, opponent at the bar, and friend, I became thoroughly acquainted with every side of his nature. As a lawyer, he was able, learned, and thorough, and had great faith in his clients and all evidence which contributed to their success. He enjoyed the trial of causes, but abhorred office work except when preparing for trial. He was particularly adapted to the trial of jury cases, and perhaps no lawyer in his section of the state tried more of them than he did. He was strong, exhaustive, and awkward, rather than brilliant, incisive, and ornate. That very able lawyer and brilliant advocate, the late Senator Carpenter, when on the defense, repeatedly submitted his cause to the jury upon the plaintiff's opening, rather than to take the chances of a closing argument from Mr. BENNETT. He had a remarkable memory, and was a very extensive reader, and enjoyed detailing to others what he had read. He was a great story-teller and would occasionally astonish his oldest acquaintances by detailing some occurrence in his early life which they had never before heard. He was a man of deep sympathies, strong affections, and bitter resentments, but wonderfully forgiving and magnanimous. In his opinion his friends had but few, if any, faults, and his enemies few, if any, virtues. He was a unique and remarkable man and generally the center of social attractions. I never had the pleasure of seeing him preside in court, but from what I know of his nature I assume that it required some effort for him to remain impartial and nonpartisan. His judgments in court, however, generally stood the test of discriminating review. His lack of business qualifications and executive tact and forecast made him some enemies; but his faults were the results of a dominating impulse, rather than intentional wrong. He had the faith of a Christian in things unseen, and would

cheerfully obey any mandate which to his mind came from the spiritual realm. He was exceedingly kind-hearted and lavish in his sympathies for the suffering. the needy, and the lowly. His memory will long be preserved, not only in the work he has left behind him, but in the traditions of the bar.

We fully indorse what has been said on the presentation made. The memorial and proceedings will be spread upon the records of the court.

DEATH OF JUDGE JAMES A. MALLORY.

(Born September 28, 1827. Died November 3, 1899.)

Mr. F. W. von Cotzhausen of Milwaukee then addressed the court:

May I interrupt for a few minutes the routine of business and request your Honors to unite with us in paying a last tribute to a departed friend? Although not upon the calendar this is said to be a matter of the highest privilege and order.

The Hon. JAMES A. MALLORY, for many years the judge of our municipal court, is dead. He died on the 3d day of November last. The Milwaukee bar have adopted a memorial, which I am delegated to present to this court.

Memorial of the Milwaukee Bar.

Death has again entered our midst and taken one of our members, whose long life and conspicuous position have made the blow which smote him widely known and keenly felt by all. The frequency with which such occurrences have happened of late with us is somewhat startling, and admonishes us to remember that we, too, are mortal, and to consider the brevity and uncertainty of human life. The young may die — they are not exempt from the ultimate fate that awaits all because of their youth and vigor; the old receive the summons and yield when the final decree is pronounced. The head crowned with laurels is laid low in the ground, notwithstanding the noble deeds which won the adornment; the robes of honor and fame are thrown aside for the habiliments of woe. The exalted station crumbles beneath the feet of him who stands thereon; the occupant falls like a stone and sinks into the unheeding earth. An honorable name is worth all the self-denial and prudent efforts to gain it, and like precious ointment the fragrance thereof is lasting; and even though he who won it may have departed and left it behind, the remembrance thereof with those to whom it became known

is more durable than shining brass or polished marble, and needs no monument to perpetuate its memory or to emblazon its glory.

The Honorable JAMES A. MALLORY, our associate and fellow member of the bar, has gone from hence, and we assemble here to mourn his departure and to offer a memorial to his name. The old maxim, "*Nil de mortuis nisi bonum*," is applicable here as elsewhere; and we will only make mention of his upright deportment and his praiseworthy acts. He may have had faults and failings. Who has them not? Let him who is without blame and faultless cast the first stone. We come to commend his noble qualities of mind and heart. Let his detractors, if any there be, keep silence while we make mention of his virtues and speak words of consolation to those who lament his loss. Certainly he must have had much about his character and conduct in his official life that was worthy of approbation and esteem, or he would not have received from those who knew him well and appreciated his abilities and qualifications the indorsement which he so frequently had, by being term after term chosen as the one most preferred by them for the honorable and responsible position which he occupied so long and the duties of which he discharged so faithfully.

It is worthy of remark that he held the office to which he was appointed and repeatedly elected longer than any other incumbent of a similar judicial position in this city has done since the organization of the state government. The whole length of time in which he acted continually as judge of the municipal court in the county of Milwaukee was twenty-nine years. While his long service made the performance of his labor somewhat monotonous and tedious, he seldom took any relaxation, or manifested impatience or irritability when the details of criminal offenses were brought before him, however offensive, irksome, or annoying. He was noted for his calm and deliberate judgment, his quick and keen perception of justice and equity, and his firm adherence to truth and unflinching determination to award adequate punishment for violations of law. He was stern and dignified in his manners when administering justice. He rendered judgment according to the law, without fear or favor, to the rich and poor alike.

In his private life he was unobtrusive and reserved; but in his love and fondness for children he showed a tenderness of heart and kindness of feeling which was the more remarkable as opposed to his sturdy demeanor ofttimes toward others.

The grim messenger called away the loved companion of his early days while yet in youthful womanhood, and his care and solicitude was devoted not only to his children, but to those who were bound to him by the ties of kindred and relationship, and those of his household and family who survive him will feel his loss the more because of his long-lived devotion to their interest and welfare.

Death had no terrors for him. He greeted its approach with a smile, while those who stood by his dying bed were melting in tears.

We have nothing but commendation to offer for him who now has become indifferent to either censure or praise, but who might have said with confidence and without vain boasting, "I have wrought out for myself a monument more enduring than brass or marble."

Mr. Cotzhausen continued:

To this memorial I have but little to add:

Often and oftener, as we grow old, we are summoned to meet in mourning over the dead. With the legal fraternity an expression of sympathy on the loss of a member is common, yea customary. It seems to be called for by the traditions of the bar and our law of professional ethics. The present occasion, however, involves far more than a mere observance of etiquette and usage. Seldom, in the history of our association, have our hearts been more heavily weighted with sorrow, than upon the announcement that JAMES A. MALLORY was gone. The bench and bar lost one of their brightest members, the community one of its foremost citizens, and many of us a warm, sympathetic, sacrificing friend.

I do not mean to indulge in undue eulogy. Frequently have I wished with others that there were a little more warmth during life and less ostentation at the grave. No one is more than myself averse to formality and the mere appearance of things. I do not even unreservedly subscribe to the Latin quotation, which seems to have crept into this memorial: "*De mortuis nil nisi bonum.*" Classical and Christian-like as the sentiment may be, I rather believe with the old Egyptians, who were accustomed to sit in judgment upon the dead, and who judicially established from their past life whether they deserved embalming, being assigned a lasting tomb, and the grateful remembrance of future generations. Nay, no flattery! "*De mortuis nil nisi verum*" I deem decidedly more appropriate. Certainly, in the face of death we ought to be true to ourselves.

But when applied to our departed friend there is indeed but little occasion for charity and indulgence. MALLORY'S life was exceptionally free from all that challenges criticism.

I have known the judge for many years. He, Joshua Stark, and R. N. Austin constituted the first committee for the examination of applicants to the bar under the law as changed in 1859, at which time I was admitted. He was then district attorney, and soon thereafter became elevated to the bench, which position he held for almost thirty years. His long tenure of office, beyond question, materially assisted in formulating his character. Few of us ever knew him as a practitioner in civil causes. I do not think that he ever was made to feel the rivalry,

friction, and embarrassment of the ordinary professional life. He never learned how difficult it is for one in active practice to be true to one's self and client, and still overcome occasional misconceptions on the part of the public. With MALLORY the very opportunities for exposing himself to criticism were largely wanting. His whole life, not only his acts but his thoughts and motives, was constantly spread before us; and every one respected, many admired, him.

The early years of my practice brought me almost daily into his court. Yes, "stern and dignified" he was "in his manners when administering justice." At times he even appeared somewhat blunt and autocratic. I have always considered this to be the natural outflow of his pronounced character. One of the old Jacksonian school, it was with him "principle above policy." But when in the circle of friends, a man more affable and congenial could not well be found. While from the first I liked the man, I gradually learned to love him.

As a judge he was beyond reproach. It is well said in this memorial: "He was noted for his calm, deliberate judgment, his quick conception of justice and equity, his firm adherence to truth, and his unflinching determination to award adequate punishment for violations of law."

Adequate punishment! In police circles it was commonly dwelt upon that the exceptional freedom from crime in our city was owing to the unmerciful sentences which the judge imposed upon the professional criminal. And on the other side, when dealing with an outbreak of momentary passion, or the petty annoyances arising from the enforcement of police regulations, no one was inclined to be more forbearing. With him, in formulating judgment, it was not so much the act as the motive, which controlled the punishment; and truly he was named:

JAMES AUGUSTUS MALLORY.

There was nothing trivial in our departed friend. Throughout he was a man of noble mould. "Noble of Nature's own creating." He appeared to me the very incarnation of all that a truly republican spirit implies; like the old Spartan in the most classical period of his time.

Simple, frugal, manly, brave; and, most conspicuous in all his life, an unflinching sense of duty. Whether on the bench, in public or in private relations, Judge MALLORY could implicitly be depended upon. Every outside consideration, every individual preference, every impulse of egotism — all had to give way when this his sense of duty was appealed to. Frequently have I seen him in the height of public excitement (in fact whenever an exigency arose), however trying or unpopular the nature of his service, always in the front ranks and in the brunt of battle — calm and dignified, but every fiber strained upon the maintenance of law and order. He believed with Pope that "Order is Heaven's first law." And as to duty it was with MALLORY second.

Refreshing and gratifying indeed was this spirit of true manhood, this dutiful recognition of the most elementary principle underlying society; especially at a time when, while stickling for our rights, real and imaginary, the corresponding duties have become almost obliterated in the public mind.

He is gone, but not to be forgotten. When the old Roman, Quintus Metellus, received the news of the death of Scipio Africanus, one of the greatest men of his time, he turned, deeply affected, to his children and spoke: "My sons, go out and take part in that funeral. Never will you witness one of a nobler citizen than he." And so here. Hence this memorial of the bar. There may be others like JAMES A. MALLORY, but nobler none.

Mr. Justice DODGE, on behalf of the court, said in response:

The court appreciates and deplores that with the death of Judge MALLORY has ended a life of more than common usefulness to the community and to mankind. So much of that life was spent in the labors of a judicial place that Judge MALLORY did not impress himself upon the profession as the soundness of his intellect and the vigor and integrity of his character might well have assured under other circumstances. Nevertheless, the reports of the cases in this court in which he participated forbid doubt that, had his life been devoted to the labors of the barrister or the counselor, his place would have been in the highest rank of those able and original lawyers who distinguished the first half century of the state's existence and formed its system of jurisprudence.

That judicial position, which may be said to have absorbed to itself his life work, demanded abilities of a peculiarly high and at the same time practical character. There the sword of justice must be wielded with the utmost courage, but with wisdom and discretion, at one moment to smite with condign punishment the hardened criminal, at another gently but firmly to admonish and reclaim him whose trespass is but a wavering between right and wrong. Judge MALLORY justified the confidence reposed in him by his fellow citizens, and, the terror of vice and the fostering friend of tottering virtue, gave to the community a model which for many years has and will elevate and maintain the standard of criminal justice.

His sterling qualities of high integrity, firm and self-reliant independence of thought and action, his devotion to the golden rule as the wisest guiding principle as well in politics as in private life, were all impressed on those who knew him. They are spoken in the testimonials already tendered better than I can express them. Verily the world is better that he has lived.

DEATH OF WINFIELD SMITH.

Mr. Joshua Stark of Milwaukee then presented the following

Memorial of the Bar Association of Milwaukee.

The name of another member of the early bar of this county has been stricken from its roll by death, and we, his professional associates, pause for a moment to record our estimate of his life and character.

WINFIELD SMITH was born at Fort Howard, Wisconsin, August 16, 1827, where his father (a captain in the United States army) was then stationed in the military service. He was named after General Winfield Scott, of whose military family Captain Smith was for several years a member. His boyhood and youth were passed in the state of Michigan in the enjoyment of superior educational advantages. In 1844 he entered an advanced class in Michigan University, and graduated from that institution with honor before he reached the age of nineteen years. On leaving the university he taught for a year a private school in Monroe, Michigan, where he had been a resident for several years, and then took up the study of the law. In 1848 he entered the law office of Isaac P. Christiancy, afterwards Chief Justice of the Supreme Court of Michigan and United States Senator from that state. After pursuing legal studies there for about a year, he removed to Milwaukee and entered the law office of Emmons & Van Dyke, being then twenty-two years of age.

In 1850 he was admitted to the bar and entered upon the active practice of the legal profession in this city, which remained ever after his home. Soon after he commenced practice he was appointed a commissioner of the United States District Court of Wisconsin, the duties of which office he discharged with ability and firmness for some ten years.

In 1855 he formed a law partnership with Edward Salomon, who had been prepared for the bar in part under the training of Edward G. Ryan. This partnership, under the name of Smith & Salomon, continued about fifteen years, when Salomon removed to the city of New York. Mr. Salomon, having been elected Lieutenant Governor in 1861, became Governor of the state April 19, 1862, upon the accidental death of Governor Harvey.

James H. Howe, then attorney general, having resigned that office October 7, 1862, to take command of a regiment of Wisconsin volunteers, Mr. SMITH was appointed by Governor Salomon to fill the vacancy for the remainder of the official term. In 1863 he was elected by the people to the office for a full term, and retired on the first of January, 1866, after a service of a little more than three years, distinguished by zeal and

efficiency in the protection of the public interests in charge of the law department of the state. He served his district in the Assembly of the state at the session of 1872, being chairman of the judiciary committee of that body and taking an active part in its legislation.

After the removal of his partner to New York he formed a partnership with Joshua Stark under the name of Smith & Stark, which continued until 1875, when he became associated with the late Matthew H. Carpenter and A. A. L. Smith, under the firm name of Carpenter & Smiths. After the death of Senator Carpenter the surviving partners continued in practice together for three years, when Mr. A. A. L. Smith withdrew and formed another partnership relation.

Mr. SMITH continued in the active practice of the profession until about the year 1890, from which time the care of his various property interests demanded the greater part of his time and effort, and his professional activity almost ceased.

He died on the 8th day of November, 1899.

WINFIELD SMITH was a man of marked ability in his profession. Inheriting superior physical and mental endowments, he received the best academic and collegiate training which the schools of the west afforded, and entered the profession well prepared in respect to learning and mental discipline to take high rank at the bar.

He was studious, ambitious, and thorough in the pursuit not only of legal studies, but of culture in general literature and in art. He early acquired familiarity with the French and German languages, both of which he spoke. He was also a lover of music and of other arts to which he gave no little attention.

As a lawyer he was thorough, painstaking, and able in the preparation and trial of causes, and displayed much force and acumen in argument before the courts. During his association with Governor Salomon in practice, the business of the firm grew to large proportions. During that time and afterwards Mr. SMITH was engaged in much very important litigation, which was conducted by him with great skill and ability and gave him prominence and distinction as a lawyer.

Throughout his active career at the bar, Mr. SMITH ranked as one of its ablest and most conspicuous members. In personal character he was upright and honorable. Socially he was genial, courteous, and refined. As a citizen, he was patriotic and faithful, giving active service to those interests of city, state, and nation which appeared to him of paramount importance. From the time he became a resident of Milwaukee until his death he was an esteemed member of the Protestant Episcopal Church, of which he was for many years a trusted officer.

After completing the allotted term of three score and ten years, he has laid down life's burdens and entered into his eternal rest. We lay upon his bier this brief memorial as our last tribute to his memory.

For the court, Mr. Chief Justice CASSODAY responded:

It is thirty-five years ago the present winter since I first became personally acquainted with Mr. SMITH. He was then regarded as an able lawyer, and was serving his second term as attorney general of this state. It so happened that I then met him occasionally in conference on important matters of legislation. His thorough mastery of the questions involved, and his clear expositions of them, impressed all who heard him with his good judgment. The last time I saw him was about a year ago, when he visited Madison in a social way, merely to renew his old acquaintances. His rehearsal at that time of his student life at the University of Michigan, from which he graduated in 1846, was to me particularly interesting. Thoroughly educated for his chosen profession, with a clear mind, studious habits, and untiring industry, his fifty years at the bar, and forty years of active practice before retirement, were marked by ability of a high order and by success seldom attainable. The able and distinguished members of the bar, who from time to time were connected with him in business, or became his intimate friends, attest, not only his ability and skill as a lawyer, but also his courteous manners, his abiding friendships, his honorable conduct, and his uprightness of character. May his memory be preserved as a rich legacy to our noble profession. The court fully indorses what has been so well said of him at the bar. The proceedings will be entered upon the records of the court.

DEATH OF SAMUEL A. HARPER.

Mr. Robert M. LaFollette of Madison then addressed the court as follows:

May it please your Honors: — A committee of the Dane County Bar Association, consisting of the Honorable Henry M. Lewis, Ernest N. Warner, Esq., and myself were appointed to draft a suitable memorial of the life and character of the Honorable SAMUEL A. HARPER, a member of this bar, who died at his home in the city of Madison, on the 19th day of March, A. D. 1898. The members of that committee assigned to me the preparation of that memorial, and acting in their behalf I am directed to present the same to this court and to request for the Dane County Bar Association that it be properly entered and recorded here.

Memorial of the Dane County Bar Association.

Nearly two years have passed since we stood by the open grave of SAMUEL A. HARPER, a distinguished member of this bar and citizen of this state. The profound sense of personal loss sustained by those as-

sociated with him professionally, and as a neighbor and friend, is as keen and poignant as at the first hour. To all who knew him personally,—and he was most widely and intimately known,—his memory is very dear and will be fondly cherished throughout life.

In presenting this memorial for the committee of the Dane county bar, I know well that words spoken of the dead are likely to be overloaded with statements respecting their better traits of character and mind. What we spread here upon the permanent record of this court of each other, as we finally and forever pass out of the ranks of the profession, should, as near as may be, correctly and faithfully portray the life and character, the mental and moral attributes constituting the real personality of the man. So written and preserved our record will be of real value now and hereafter. Exaggeration and misrepresentation are not difficult. It is much easier, and requires a much lower order of talent, to draw a caricature or make a sketch from pure fancy than it does to paint a correct likeness. As an artist gives to us in lasting colors on the canvas, in exact form and feature, a truthful speaking likeness of his subject, so let us endeavor to draw upon the record of this court an accurate representation of SAMUEL A. HARPER, man and brother, as we knew him at this bar.

He was born on the 9th day of January, 1853, near the village of Hazel Green, in Grant county, Wisconsin. His parents were of the oldest and best families in Virginia. His father was the son of a college president, his mother the daughter of a distinguished member of the Virginia bar. Three of her brothers were lawyers of high rank in that state, and one was a learned and able circuit judge of West Virginia. The father and mother of SAMUEL ALBERT HARPER were both people of superior intelligence, education, and strength of character. From these lines the boy received his extraordinary mental endowment. His mastery of books attracted wide attention before he had reached his tenth year, and he was ready for college away in advance of his time. He taught school for some years before entering the University of Wisconsin. He entered the state university in 1875, and quickly distinguished himself for unusual scholarship, taking high rank in all his classes, until the close of his sophomore year. It was then his great misfortune to sustain a severe and painful injury, which obliged him to quit college and indeed came near terminating, and for seven or eight years completely clouded, his life. Partially recovering he entered the law department of the university in 1880, and graduated in 1881.

The condition of his health was still too precarious to admit of his engaging in the severe labor incident to the practice of his profession. However, mental occupation and activity was the breath of his life, and

he accepted the principalship of the schools of Waukon, Iowa, where he continued for a period of three years. During all this time he had been a very great sufferer from his injury, and a diseased condition of the nerves which had followed now threatened complete mental and physical overthrow. During the latter part of 1884 and the first half of 1885 he was under the care of the most eminent specialist of the country in nervous troubles, and was, as we all believed, entirely restored to health and vigor.

January 1, 1886, Mr. HARPER entered the law office of LaFollette & Siebecker, and January 1, 1887, became the junior member of the firm of LaFollette, Siebecker & Harper.

In January, 1890, Mr. Siebecker was appointed judge of this circuit, and the senior member of the firm being then in Washington, Mr. HARPER arranged the organization of the firm of LaFollette, Harper, Roe & Zimmerman. Mr. HARPER continued a member of this firm until its dissolution, October, 1894, when he formed a partnership with his brother, Mr. J. C. Harper, of this bar, and this partnership continued as the firm of Harper & Harper until the death of the senior member.

Mr. HARPER was in his thirty-fifth year when he became a member of the firm of LaFollette, Siebecker & Harper and may be said to have begun the practice of law upon his own account. Few men beginning at that period in life have ever risen to prominence in any of the learned professions. Nearly every man who wins distinction in the law is secure in his fame before he reaches the age at which Mr. HARPER began to practice. Yet at this bar, the equal of any bar in this country, there are none so strong that they would not have prepared themselves with care to meet Mr. HARPER in any trial or upon any argument. He was not at his best in the arena of trial by jury, and indeed until the last few years of his life he shrank from that test as a child from physical pain; but being once in and warmed to his work, he was even there a most worthy antagonist. He recognized the prime importance of the opening statement of a case to the jury before the introduction of the testimony, and in the power of clear, lucid exposition to the jury of the case to be presented he was, it is believed, the peer of any of his associates at this bar. So, too, in the examination and cross-examination of witnesses, Mr. HARPER was very successful. His good sense and good poise, his marvelously quick perceptions, his gift of diplomacy, his brilliant wit, his singularly clear and felicitous language, gave him exceptional advantages for this difficult and exacting duty.

In the presentation of the law to the court he was clear, cogent, and always logical. Just in proportion as the propositions were complicated and difficult, did he find the greater intellectual pleasure in their discussion before the court. And when in the last years of his practice he

had finally mastered the nervousness which had caused him in the beginning to draw back from all court work, it was a delight to watch the play of his fine analytical mind in the elucidation of a knotty legal proposition to the court.

In the preparation of a case for trial Mr. HARPER was unsurpassed. His study of the law before he entered upon its practice covered a period of nearly five years. His powers of memory were extraordinary, and it is not too much to say that he was learned in the law. He was an admirable pleader, and his legal papers were models of legal and literary perfection. His work was swift and accurate. He would dictate rapidly in choice English for hours at a time, and with such a comprehensive grasp of the rules of pleading, of the controlling decisions, and of the facts to be covered, that scarcely an alteration would be found necessary in the work when extended from the stenographic notes. No pleading of his was ever successfully assailed by counsel or criticised by the court.

He was appointed by President Harrison United States district attorney for the Western district of Wisconsin in 1890, when he had been engaged in practice but little more than three years. He tried many contested cases each term of the federal court during the four years covered by his commission, and left the remarkable record of having won every case but two, and in these two there were disagreements.

It is submitted that his career as a lawyer, covering as it does a period of little more than a decade, is in any view one of great distinction and eminence in his profession.

But when it is remembered in this connection, that in this brief space of time he acquired a personal acquaintance in the state and nation, larger than do most men who spend their mature years in public life; when it is remembered that he gave weeks and months of every year to public and party service in matters of state and national interest, until his influence was recognized as an important force throughout the whole commonwealth, then do we begin to appreciate somewhat the real character and power of this man, who left us so abruptly, when he was yet on the eastern slope of life's ascent.

Whether he was advocating some measure of great concern to the university he loved as a second mother, or stood out as the champion of some vital political reform, he was everywhere known and acknowledged as strong and unassailable. In personal conversation, in conference and counsel, in argument before a legislative committee, in debate before a convention, he carried conviction by sheer force of intellect and by the moral strength of his position. He was right, and he always commanded confidence. In recent years he gave liberally of his time in support of good, or opposition to bad, measures pending before the

legislature, and always without fee or reward. He possessed in a remarkable degree the talent for political organization, a deep insight into the motives of men, great firmness, courage, decision, and dispatch, and, presiding over all, a critical and nearly infallible political judgment. Combined with this was a spirit of good fellowship that disarmed enmity, parried attack, and drew men into the genial warmth of his lovable nature.

All this and much more did he accomplish in ten short years. For in fairly judging Mr. HARPER'S achievements at this bar it should not be overlooked that at the same time he engaged in and successfully conducted business enterprises involving large interests and requiring the exercise of sound business judgment. Between the ages of thirty-five and forty-five he not only distinguished himself as an able lawyer and took a commanding position in public affairs in the state, but by his superior business judgment, sagacity, and foresight he acquired a comfortable fortune aside from his professional earnings.

That SAMUEL A. HARPER possessed indeed a great intellect none who knew him well could question. His love of learning was a part of his individuality. No matter what the subject, his mind was always alert, eager, observant, and at the same time reflective. He was a ripe scholar. No man ever sounded him in this respect who failed of surprise at the extent, variety, and accuracy of his knowledge. Scarcely a book could be suggested with which he was not entirely familiar, from heathen mythology to the works of Herbert Spencer, from the philosophy of Kant to the modern novel.

It has been well said of him, "That his character had a subtle charm, difficult to portray. He impressed his friends as one who had been dipped in the fountain of eternal youth and always retained the freshness of mind, the eagerness and boundless enthusiasm of a boy, together with the maturity and deliberation of manhood's estate. This enthusiasm, this youthful quality made him a most happy companion. Keenly alive to the humorous, ready in repartee, the most brilliant scintillations of wit fell spontaneously from his lips, making him the life of every company. But his wit was always without sting or coarseness. He had a cleanliness of thought, a purity of nature that would have befitted the highest womanhood, but which was none the less a consistent part of his perfect manliness." To know him was to love him. He never made an enemy, upon his own account, and never lost a friend, unless in the service of another.

The writer of this sketch knew SAMUEL HARPER as well as any person could know him. It has been said that man or woman never makes a complete confidant of more than one person in this life, and that choice can only be made in youth, and between individuals of the same

sex. Be that as it may, for almost a quarter of a century our lives were bound together by as close a friendship as can exist between man and man. Either could have said of the other, as Hamlet to Horatio:

> "Since my dear soul was mistress of her choice,
> And could of men distinguish, her election
> Hath sealed thee for herself."

I knew his faults and his foibles,—and who is wholly free from them? It may have been said of him that he was sometimes a procrastinator, that he was even occasionally neglectful. He was neither. No man was ever more faithful to an obligation. No man loved work for work's sake better than he. No brain ever found more delight and zest in the severest mental strain. It was to him an intellectual feast from which it was difficult and often necessary to literally force him away for needed rest and diversion.

That he did from time to time fall behind the appointed hour with this or that engagement was certainly true; a fact that he once wittily acknowledged by announcing himself to a party of waiting friends as "the late Mr. HARPER." This occurred perhaps more frequently with him than with those safe and formal men, who with cold and steady hand measure off for each hour its exact and appointed duty; those men who cannot, by any call for help, any cry of distress, be diverted or turned aside from the business of the hour to lend a hand to some fellow who falters by the way. Whatever fault he had in this respect,—and I know of no other in any respect,—was due to that greatness of heart, that spontaneous and overmastering sympathy which he had for every human creature who came to him for help. This element in his nature amounted almost to a weakness, and certainly shortened his precious life. Through it his exacting obligations were multiplied, the present hour overcrowded, and the future constantly forestalled.

And so as his life broadened, as his acquaintance extended, his duties and responsibilities became more and more complex. His hours of rest and recreation shortened until it was a habit to turn night into day, and snatch from the passing time but the briefest moment for rest and recuperation.

No one knows how late the light burned in his office on the last fatal night as he hung over his unfinished task. The early morning found him in the grip of mortal disease. Its hold could not be broken. The daily reports from that darkened chamber were awaited in painful suspense by the thousands who loved him throughout the state. In all the days and through the long watches of the night that active mind would not be still, but in the ecstacy of its fevered imagination he was at the forum of this court, and in marvelously beautiful and at times sublime speech performing the high office of the advocate. Finally at

the close of the week, in the hush and stillness of the night, that noble heart ceased to beat, that great brain was at rest. And when the Sabbath morning broke, let us believe that he who so loved to live found another life where all the virtues and activities of his being, developed so highly here, shall grow and expand through infinite time.

Life and Death, the two great mysteries in which we are helplessly involved! How thin and impalpable the veil between, and yet how hopelessly impenetrable! We see our loved ones slipping from us. We hold fast to their dear forms. Nearer and nearer they are drawn to where our finite section of time touches the infinite. Suddenly our outstretched hands are empty. We are alone. The shadowy veil envelopes them, and they are gone. We cannot rend, we cannot reach beyond it. We can only bow in despair, appalled by the dark and tragic doubts which haunt the human soul.

"Nothing is known,
But we believe that God is overhead,
And as life is to the living,
So death is to the dead."

And so lived and died SAMUEL A. HARPER. It was barely the beginning of his rapidly enlarging sphere when he was summoned away. His life was broken off in the middle. But it was filled with good deeds and great thoughts, with noble aspirations and high achievements.

"He was a man, take him for all in all,
I shall not look upon his like again."

Mr. Justice BARDEEN responded, on behalf of the court:

The sadness attending the removal from us of any member of this bar is tempered by the pleasant recollections which surround his memory. The kind words said of Mr. HARPER are fully justified by my acquaintance with him. His cheerful ways, his kindness of disposition, his brightness of intellect, his energy of action, made him a valuable citizen and a respected member of his profession. We fully share in the regret and sorrow, made keener by personal friendship, that one so full of promise should have been taken away in the prime of life. The tributes to his memory, so well presented, are heartily approved. Let the record be made that a genial friend, an honored citizen, and a respected member of the bar of this court has passed to his reward.

CASES DETERMINED

AT THE

January Term, 1900.

GATZOW, Respondent, vs. BUENING and another, Appellants.

February 3 — February 27, 1900.

(1, 2) *Jurors: Examination: Bias: Waiver of errors.* (3, 4) *Notice of injuries, when required: Condition precedent or limitation?* (5) *Action, tort or contract? Conspiracy.* (6–9) *Restraint of trade: Unlawful combinations: Overt acts.* (10, 11) *Special verdict: Denial: Immaterial error.* (12–14) *Damages: Injury to feelings.*

1. Where a defense is that the acts complained of were done pursuant to the by-laws of a liverymen's union to which defendants belonged, jurors may, as a basis for challenge either for cause or peremptory, be asked as to their being biased against unions.
2. The improper exclusion of questions put to jurors on their examination is waived by failure to object to the collected jury.
3. Subd. 5, sec. 4222, Stats. 1898 (providing that no action to recover damages for "an injury to the person" shall be maintained unless notice shall have been given as therein prescribed within one year after the happening of the event causing such damages), refers to bodily injuries and does not apply to an action for loss of money and injury to the feelings caused by an unlawful conspiracy and the acts done pursuant thereto.
4. Said subd. 5, sec. 4222, Stats. 1898, prescribes a limitation upon the remedy, not a condition of the right itself, and the objection that the notice was not given is waived if not taken by demurrer or answer.
5. A complaint alleged that plaintiff had hired from one of the defendants, a liveryman, a hearse and carriage to be used at the funeral of plaintiff's child, and had paid therefor; that both defendants, with a malicious design to humiliate and injure plaint-

106 1
d107 483

106 1
109 31
109 245

106 1
110 [6]259
s49 LRA 475
52 LRA 621

106 1
111 [3]319
d111 [3]320

106 1
113 [4]296

106 1
56 LRA 804n
57 LRA 553

106 1
116 [4] 30

iff, entered into an agreement to deprive him of the use of the hearse and carriage and to cause them to be taken away from his residence at about the instant they would be needed to convey the child's body and attending friends to the grave; and that they carried out such design, thereby causing great mental distress to plaintiff, besides the loss of the amount paid by him. *Held*, that the action was one sounding in tort and not for breach of contract.

6. A combination of liverymen to limit their services to persons patronizing them exclusively, and to monopolize the livery business in Milwaukee, including service for funerals and to carry prices to and maintain them at such a level as the combination might see fit to adopt, and to so stifle competition in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, is unlawful as against public policy.

7. Such a combination is none the less unlawful because existing under a self-imposed constitution and governed by by-laws and conducting its operations in a public or semi-public way; and the fact that they acted in accordance with their obligations to the association will constitute no protection to its members as regards liability for compensatory damages to a person specially injured by their overt acts done in pursuit of the purposes of the organization.

8. A member of such a liverymen's association let a hearse and carriage to plaintiff for the funeral of his child, but, upon learning that the person in charge was an undertaker and liveryman doing an independent business, joined with the secretary of the association, in accordance with its rules, in sending the vehicles away from plaintiff's house. This was done just as they were about to be used, regardless of the fact that such action would inevitably shock and greatly distress the plaintiff, in order to demonstrate the power of the association to punish independent liverymen and persons dealing with them. *Held*, that such acts were unlawful and rendered the wrongdoers liable for actual and also for exemplary damages.

9. Even though a combination may not be in itself unlawful as an unreasonable interference with trade or individual freedom, yet overt, unlawful acts by two or more of its members acting by agreement to carry out its purpose, will render the combination, as to them, unlawful.

10. Under sec. 2858, Stats. 1898, the right to a special verdict is absolute if the request therefor is made before any argument to the jury, and it is the duty of the trial court to prepare the form therefor. Where, therefore, a special verdict was seasonably requested and

the court stated that counsel might prepare the questions, it was error, after the argument, when the request was renewed and the questions submitted for approval, to deny the request on the ground that it came too late.

11. Denial of a request for a special verdict was not a material error where the facts were admitted or established by the evidence without reasonable controversy, leaving nothing to submit to the jury except the amount of the damages.

12. Damages in a tort action are not divided into actual, compensatory, and exemplary. Actual damages and compensatory damages are synonymous terms, each covering all loss recoverable as a matter of right.

13. Where recoverable damages include injury to the feelings, compensation therefor is a matter of right, and not, like punitive damages, in the discretion of the jury.

14. There being no physical injury, recovery cannot be had for injury to feelings, where plaintiff hired, for the funeral of his child, a carriage and hearse of a member of a liverymen's association, and such member and the secretary of the association ordered them away just as they were about to be used, because of rules of the association that members should not furnish vehicles where the undertaker in charge patronized nonunion liverymen.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action for damages for injuries caused by an alleged unlawful conspiracy and acts done pursuant thereto. The complaint stated in substance as follows: July 30, 1897, plaintiff employed and paid defendant *Schubert*, a liveryman, for the services of a hearse and carriage for use at the funeral of the former's four-year-old child, which was to be buried from his residence in the city of Milwaukee, Wisconsin, on the 1st day of August, 1897. The hearse and carriage, with teams and drivers, as agreed upon, were sent to plaintiff's residence and there properly located in front of such residence to await the termination of the funeral services therein. Defendants entered into an agreement to deprive plaintiff of the use of the hearse and carriage and to cause them to be taken away from his residence at about

the instant they would be needed to convey the child's body and attending friends to the grave side. Such agreement was entered into with a malicious design to humiliate and injure plaintiff, which was fully accomplished. Just as the funeral services at the house were over, and the coffin containing the child's remains about to be placed in the hearse, defendants, pursuant to the agreement above stated, caused the drivers of the hearse and carriage to take the vehicles away, leaving plaintiff to resort to such means as he might be able to procure to continue the funeral. When such occurrence took place there were a large number of people in attendance at the funeral, to whom plaintiff was unable to explain the rude breaking up of the funeral arrangements. The conduct of the defendants as aforesaid caused plaintiff great humiliation and mental distress, to his damage in the sum of $5,000, besides the loss of $8 paid for the use of the vehicles.

Defendant *Schubert* denied all the allegations of the complaint regarding an agreement between himself and *Buening*, or any agreement, to deprive plaintiff of the hearse and carriage, or either of them, or any design to maliciously or otherwise injure plaintiff. The allegations regarding the preparation for the funeral were admitted, including the allegation that the hearse and carriage were furnished to plaintiff and afterwards taken away so that they were not used at the funeral. All allegations of the complaint not specifically admitted or denied were denied generally.

The answer of *Buening* stated that there was a liverymen's association in the city of Milwaukee at the time of the occurrence in question, of which he was secretary, and *Schubert* a member; that one of the by-laws of such association prohibited, under penalty, any member thereof from furnishing vehicles of any kind to any liveryman who hired them out at less than the association prices, and that it was said defendant's duty, as secretary of the association, to do

whatever he did on the occasion complained of, in order to prevent violations of the association by-laws; that after the hearse and carriage left *Schubert's* barn to go to plaintiff's residence, the defendant was notified that *Schubert* was violating the laws of the association by furnishing vehicles to Nieman, a liveryman and undertaker who had charge of the funeral in question and who was not a member of the liverymen's association; that Nieman, on such occasion, as he was in the habit of doing, furnished carriages and vehicles at lower prices, and paid his employees less, than the association permitted; that on being informed of the facts he (*Buening*) communicated with *Schubert's* place of business by telephone and was requested therefrom to have the driver of the hearse communicate with his employer's place of business by telephone; that he complied with such request, and the result was that the hearse and carriages were taken away from plaintiff's residence and he was deprived of their use; that defendant merely performed his duties to the association, without any specific agreement with *Schubert* to injure plaintiff, and without malice toward him.

The evidence showed the existence of the liverymen's union as alleged in *Buening's* answer; that he was secretary and *Schubert* a member thereof; that Nieman was a liveryman and undertaker doing business outside of the association; that according to the by-laws of the association no member thereof was allowed to do business with any person who did not patronize its members exclusively, or to let a hearse to a private party for a funeral where the undertaker in charge of such funeral was reputed to patronize nonunion members; or to any person whose family, for the occasion, patronized a nonunion livery; that on the occasion in question plaintiff employed Nieman to obtain the carriage and hearse for him, and the engagement of the hearse and carriage of the defendant *Schubert* was made through Nieman in the name of the plaintiff and without *Schubert* knowing that Nieman was

in any way concerned in the transaction; that the business was done with one of *Schubert's* employees; that, fearing the transaction might lead to a violation of the rules of the association, *Schubert* directed the driver of the hearse not to remain at the funeral if a nonunion man was in charge; that after the hearse and carriage left *Schubert's* barn to attend the funeral, *Buening* was informed of the facts, particularly that Nieman was the liveryman and undertaker employed by plaintiff, whereupon, pursuant to his duty as secretary of the union, he communicated with *Schubert's* place of business, giving notice of the violation by the latter of the rules of such union; that *Buening* was thereupon requested, by or on behalf of *Schubert*, to cause the driver of the hearse to communicate with the latter's office by telephone, and pursuant thereto *Buening* went to plaintiff's residence and stated to such driver that his employer wanted to talk with him by telephone. There was considerable evidence that when the driver received word, as aforesaid, he got into the buggy with *Buening* and drove a short distance away from plaintiff's residence, but did not use the telephone; that he told *Buening* there was no need of it because he had orders to return and not allow the hearse and carriage to be used if Nieman officiated at the funeral, whereupon *Buening* drove back with the hearse driver, and such driver then drove away with the hearse and the carriage driver followed. There was further evidence to the effect that *Buening* visited plaintiff's residence for the purpose of preventing the hearse and carriage from being used by the plaintiff; that he ordered the driver of the hearse to return to his employer's barn; that he said to Nieman, "I am secretary of the union and authorized to have the hearse go home. I am not going to leave before the hearse goes away. I am going to break up this funeral. I am not going to have this thing go on, and this hearse has got to go home."

There was further evidence to the effect that, in *Buening's*

talk with the hearse driver and with Nieman, his conduct was such as to attract the attention of persons in the house and in the vicinity; that when he returned, after taking the driver away to talk with his employer's place of business by telephone, and the driver mounted the hearse and drove away, *Buening*, by word and manner, evidenced exultation over the success of his efforts to deprive plaintiff of the use of the hearse, saying to Nieman upon driving away, "You see what I can do. Good bye." There was further evidence to the effect that defendant *Schubert* ratified whatever was said and done in his behalf in respect to depriving plaintiff of the use of the hearse and carriage, and that all the acts in that regard were in strict harmony with the former's agreement with the liverymen's union. There was further evidence to the effect that, as soon as plaintiff and the undertaker recovered from the confusion caused by the sudden and rude taking away of the hearse and carriage and the consequent disarrangement of the funeral plans, they proceeded with the funeral by placing the coffin in one of the carriages and thus conveying it to the grave. The evidence further tended to show that it was one of the purposes of the liverymen's union to compel every liveryman to belong to it or go out of business, and to prevent competition between liverymen and hold up the prices to such a level as the union might see fit to fix.

During the impaneling of the jury defendants' counsel asked questions of the jurors respecting their belief as to the right of persons to form a union for such objects as those of the one in question. Such questions were objected to and the objections sustained, to which rulings due exceptions were taken. When the panel of jurors was complete no objection was made to the jury as a whole. Before the trial commenced, defendants' counsel moved the court to compel plaintiff to elect whether he would proceed in the action for damages for breach of contract or for damages for a tort. The

motion was denied and the ruling was excepted to. A further motion was made by defendants' attorneys to strike out all of the allegations of the complaint appropriate to an action on contract, which motion was denied and the ruling excepted to.

Defendants' counsel moved the court to instruct the jury, in substance, as follows:

(1) There being no physical injury in this case, plaintiff is not entitled to recover compensation for mental suffering.

(2) If plaintiff knew that Nieman was unable to procure the vehicles from any member of the liverymen's association, and, with such knowledge, caused Nieman to obtain them in his (plaintiff's) name, withholding from *Schubert* all knowledge of Nieman's connection with the transaction, there was no agreement between plaintiff and *Schubert* imposing any obligation upon the latter.

(3) It appearing that *Schubert* belonged to an association of liverymen and undertakers, obligating him under a penalty not to let vehicles to a person not a member of the association, and that Nieman was not a member, if Nieman falsely represented to *Schubert* that the vehicles were wanted by plaintiff, a friend of *Schubert* not engaged in the livery or undertaking business, with intent to deceive *Schubert* and to keep him from knowledge that Nieman was concerned in the transaction, the contract for hire was void and plaintiff cannot recover.

(4) Every person has a right to refuse to do business with any other person regardless of his reasons therefor, so far as the public or any individual member thereof is concerned.

(5) Any number of persons may lawfully associate themselves together and agree not to work for or deal with certain men or classes of men, and *Schubert* had a lawful right to refuse to furnish vehicles to plaintiff or Nieman, regardless of his reasons therefor.

(6) Plaintiff did not sustain any actual damage by the

occurrences complained of, and, if the agreement between plaintiff and *Schubert* was valid, plaintiff is entitled to nominal damages only.

(7) If *Schubert* was actuated by no other motive than to keep his obligations with the liverymen's association, he cannot be convicted of having acted from malicious motives.

(8) If *Schubert* did nothing more than what he supposed he was bound to do by reason of his relations to the liverymen's association, no damages can be assessed against him by way of punishment.

(9) If *Schubert*, in depriving plaintiff of the use of the hearse and carriage, had no other motive than to protect himself from incurring a penalty for violating the rules of the liverymen's association, he cannot be made to pay damages to plaintiff by way of punishment, even if his conduct toward plaintiff were illegal.

(10) If *Buening* acted solely in performance of his duty as secretary of the liverymen's association, he is not liable to plaintiff.

(11) If plaintiff was not damaged other than by being deprived of the use of the hearse, he cannot recover.

Such instructions were refused and due exceptions were taken.

Before the arguments to the jury commenced, defendants' attorneys requested the court to direct the jury to find a special verdict, whereupon the court suggested to counsel to prepare questions. At the close of the arguments, questions were submitted by defendants' counsel and the request for a special verdict renewed. The court then said that the request came too late, and the special verdict was denied. The court then instructed the jury that defendants were liable in the case as a matter of law for the actual damages which plaintiff sustained, to the amount of the eight dollars which was paid to *Schubert*. The court further instructed the jury

that plaintiff was entitled to a verdict for at least eight dollars, and that, if the taking away of the hearse and carriage was a wilful act, they might award plaintiff compensatory damages for injury to his feelings; and that, if the jury believed that defendants were actuated by malice toward plaintiff, that they had an actual intent to injure him, or that their acts were done under such circumstances as to show an utter disregard of plaintiff's rights, then they might assess punitory damages in his favor. The instructions were excepted to as regards liability of defendants for damages to plaintiff's feelings and as regards liability for punitory damages.

The jury rendered a verdict in plaintiff's favor for $1,000. There was a motion to set the verdict aside and for a new trial, upon all the grounds discussed in the opinion. The motion was denied. Judgment was rendered upon the verdict in plaintiff's favor, and defendants appealed.

For the appellant *Schubert* there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *A. J. Schmitz.*

W. B. Rubin, for the appellant *Buening.*

R. N. Austin, for the respondent.

MARSHALL, J. Questions put to jurymen during the impaneling of the jury as to their being biased against unions were improperly excluded. That was a legitimate subject of inquiry leading up to questions going to competency and as a basis for a challenge for cause, and, independent of that, as a basis for a peremptory challenge. However, no objection to the collected jury was made, and that circumstance operated to waive the previous objections. *Flynn v. State*, 97 Wis. 44; *Emery v. State*, 101 Wis. 627.

There was an objection to the introduction of any evidence because the action is for a personal injury, and notice of the claim to defendant, in compliance with subd. 5, sec. 4222, Stats. 1898, was not pleaded. The idea of the appel-

lants' counsel is that the statute creates a condition precedent to the right of action and that plaintiff must show compliance with such condition to make such right of action complete. The wording of the statute is as follows: "No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction thereof is claimed of such person or corporation." That refers to bodily injuries. This is not such an action. It is not within the statute. Moreover, the statute is a limitation upon the remedy to enforce a right, not a condition of the right itself. It is a limitation statute (*Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301), unlike sec. 1339, which prescribes the condition of a right as distinguished from a limitation upon a remedy to enforce a right. It being a statute of limitations, if it were applicable to this case, and we say it was not, the failure to take advantage of it, other than by an objection to evidence on the trial, waived the limitation upon the remedy. The law in that regard is fully discussed in *Meisenheimer v. Kellogg*, *post*, p. 30, opinion by Mr. Justice WINSLOW.

It is urged that the cause of action stated in the complaint is for breach of contract, hence that instructions to the jury, permitting an assessment of damages as in a tort action, were erroneous. The trial court rightly decided that the purpose of the action, as stated in the complaint, was to recover compensation for damages suffered through tortious conduct of the defendants. The complaint sets forth a conspiracy to commit a wrong and acts pursuant thereto, to the

special injury of the plaintiff. There is no room for serious controversy on that point.

Several errors are assigned on the theory that the combination of liverymen, known as the Liverymen's Association of Milwaukee, to limit their services to persons patronizing them exclusively, and to monopolize the livery business in Milwaukee, including such service for the burial of the dead, and to carry prices to and maintain them at such a level as the combination might see fit to adopt, and acts done in pursuit of the purposes of such combination to the prejudice of, and regardless of their effect upon, plaintiff, were not unlawful. The trial court decided to the contrary.

It is not necessary in this case to decide to what length a combination of persons in restraint of trade, and interfering with personal liberty, may go to promote the interests of its members, without violating common-law rights and rendering such persons liable to respond in damages to the persons specially injured. Judicial expressions, in recent years at least, have not been in perfect harmony on the subject. The only safe course for the public, and legitimate course for the court, is for it to adhere strictly to the rules of the common law, both as regards what constitutes an unlawful conspiracy in restraint of trade, and the consequences to the guilty parties. So long as that is the law by which rights in regard to such matters must be tested, it is not the province of the court to change, but to administer, it.

The law applicable to this case, as regards the illegality of the combination in question, was plainly stated by this court in *Milwaukee M. & B. Asso. v. Niezerowski*, 95 Wis. 129. It was there decided that all combinations in restraint of trade are contrary to public policy and illegal, unless they are for the reasonable protection, by reasonable and lawful means, of persons dealing legally with some subject matter of contract. A combination that will resort to such

means as the ruthless breaking in upon the solemnities of a funeral ceremony, or that aims to entirely monopolize such an essential to the burial of the dead according to the customs of the country as is usually furnished in cities by liverymen, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, will not stand the test above indicated. Such was the liverymen's union under consideration, by the uncontroverted evidence. Such a combination is clearly unlawful as against public policy, and the means resorted to to effect its purposes in this case were likewise unlawful. It would be hard to conceive of a combination more odiously detrimental to the public interests, and more heartlessly oppressive to individuals, than one that seeks to control the customary means used in the burial of the dead, by the resort to such wanton acts as were perpetrated by the defendants in aid of the purposes of their combination.

This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood. In *Reg. v. Druitt*, 10 Cox, Cr. Cas. 593, it was held that any combination of persons to stifle and prevent the free use of labor or capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his

talents, and his industry, is as much the subject of the law's protection as is his body.

'A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful.' 2 Bishop, New Cr. Law, § 230; Desty, Cr. Law, § 11*b*; *Morris Run C. Co. v. Barclay C. Co.* 68 Pa. St. 173.

Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.

If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy.

The union under consideration is within the condemnation of the common-law rule that a combination of persons, natural or artificial, to restrict legitimate trade or commerce in any field, by hampering or destroying individual liberty, stifling competition, or preventing the exercise of individual freedom to dispose of one's labor or capital according to his

own free will, so long as the legal rights of other persons are not infringed upon, is unlawful. The limitations upon the rule are in the nature of exceptions to it to be shown by way of defense where the combination is shown to exist. If it is not so far-reaching, as regards effects upon the public, or time or place, or the benefits of the members are not so large, as to render the combination an unreasonable interference with trade or individual freedom, that will remove from it the stamp of illegality; yet overt, unlawful acts, by two or more members of the combination acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. The plainest principles of public policy, as before indicated, condemn such a monopoly as was attempted in this case, and the conduct of the defendants to carry out the purposes of the combination was as clearly unlawful.

At the close of the evidence there was a request on the part of counsel for defendant *Schubert* for a special verdict, whereupon the court stated that the only material controverted question of fact as to such defendant was whether he participated in the withdrawal of the hearse, as stated in the complaint, and that counsel might frame a question covering that subject. At the close of the argument the request for a special verdict was renewed, and questions submitted for approval of the court. Such request was then denied as made too late, and the court proceeded to submit the case to the jury, by a general charge, for decision on the question of whether defendants, or either of them, participated in depriving plaintiff of the hearse after it arrived at his house on the day of the funeral, and on the question of whether the taking away of the hearse inflicted injury to the plaintiff's feelings, and whether the act was perpetrated with wilful intent to insult and injure plaintiff; also for an assessment of damages under rules given by the court.

The refusal to grant the request for a special verdict upon

the ground assigned therefor, was error. Under sec. 2858, Stats. 1898, the right to such a verdict was absolute, the request therefor having been made in conformity with the statute before any argument to the jury. The record indicates that the learned trial court did not consider the request complete till questions were prepared and submitted, because, when it was first made, preparation of questions by counsel was directed, and when they were presented and the request renewed, it was denied as coming too late.

The statute, in mandatory language, clearly imposes on the trial court the duty of preparing the form for the special verdict where one is seasonably requested. *Schumaker v. Heinemann*, 99 Wis. 251. It will hardly do to shift that duty onto counsel for the moving party and then deny his motion because the duty is not performed before arguments to the jury commence. The plain letter of the statute was violated. The only legitimate purpose of suggestions from counsel, as to what particular questions shall be submitted for a special verdict, is to direct the attention of the court to the issuable facts upon which the controversy depends. If the verdict does not cover all the issues essential to a determination of the case, no judgment can be rendered upon it; but if it does cover such issues no error can be successfully assigned because the form for the questions suggested by counsel was not adopted, or because questions were not framed and requested by such counsel.

The question of whether the refusal of the request for a special verdict constituted reversible error turns on whether it was prejudicial; for by the settled practice and the mandate of the statute (sec. 2829, Stats. 1898), the court must, at every stage of the action, disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party. The truth of the saying by Chief Justice Dixon, in the early history of the court, that the statute is a beneficent provision which covers a multi-

tude of errors, grows in significance as the instances multiply where the way to justice is by it rendered direct and certain and speedily traversed, notwithstanding numerous errors happening through inadvertence, negligence, or inefficiency at some point, that otherwise would delay and render the enforcement of remedies so burdensome as to, in effect, constitute a denial of justice in whole or in part.

The statute applies here. The court rightly decided, as before indicated, though the decision was not thereafter strictly followed in the charge, that the conduct of the defendants was wrongful, intentional, and specially injurious to plaintiff, entitling him to his remedy in damages therefor. It was discretionary with the court whether to direct the jury, in case of awarding exemplary damages, to separate the amount assessed therefor from the amount allowed for compensatory damages. Though the charge would indicate to the contrary, the record shows that all the facts warranting punitory damages were admitted, or were established by the evidence without reasonable controversy. Such being the case, there was nothing to submit to the jury except the mere question of the amount of the verdict. The trial court was not bound, on request for a special verdict, to submit questions covering uncontroverted facts. *Ault v. Wheeler & W. Mfg. Co.* 54 Wis. 300; *Kerkhof v. Atlas P. Co.* 68 Wis. 674; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215.

It follows that the denial of the motion for a special verdict was wrong solely on the ground of the reason assigned for it. It was useless to require the jury, as did the court, to say whether defendants, or either of them, participated in depriving plaintiff of the use of the hearse, because *Schubert* said he instructed his driver to return to the barn if a non-union man was in charge of the funeral, and that he gave such instructions in conformity to his obligations to the union; the evidence was all one way that *Buening* was the

moving spirit in causing the driver of the hearse to obey the instructions of his master, and that his acts were in accord with his duties as secretary of the union, and in conformity to a request made of him, either by *Schubert* himself or by some one in his behalf, whose acts *Schubert* fully ratified with knowledge of all the facts. Such ratification rendered *Schubert* liable for actual and exemplary damages the same in all respects as if he had originally authorized *Buening* to act in his behalf. *Robinson v. Superior R. T. R. Co.* 94 Wis. 345. There was perfect concert of action between all the parties concerned in the transaction to deprive plaintiff of the use of the hearse, and the acts of each and all were in accord with the agreement between the members of the union.

The court needlessly required the jury to say whether facts existed warranting an assessment of exemplary damages. It was sufficient that they were instructed that the assessment of such damages was discretionary with them.

It was correctly said by the court, in substance, before the formal charge was given, that the acts of the defendants were wilful and with intent to deprive plaintiff of the use of the hearse at a time when they knew it would be impossible to supply another. As men of common sense, defendants must have known that their conduct would greatly shock the sensibilities of the plaintiff, would humiliate and cause him great mental confusion, pain, and suffering. No reasonable conclusion could be arrived at from the evidence, other than that the defendants intentionally carried out their unlawful design under such circumstances as to demonstrate the power of the combination to punish liverymen for doing business in an independent way, and persons for dealing with such nonunion liverymen; that with such ends in view they proceeded with reckless disregard of consequences and with full knowledge of the inevitable result to plaintiff. All the elements of fact warranting exemplary damages appear

clearly from the evidence as matter of law. There was the wilful violation of plaintiff's rights, inflicted under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice. *McWilliams v. Bragg*, 3 Wis. 424; *Nichols v. Brabazon*, 94 Wis. 549.

The trial judge, in his charge to the jury, divided recoverable damages into three kinds,— actual, compensatory, and exemplary. He said, "If you find for the plaintiff, the damages which he may recover are actual and compensatory damages." He then, in effect, told the jury that eight dollars was the actual damage by the undisputed evidence, and that they should find a verdict at least for that sum; and then said, "If you find that the act of taking away the hearse was one of insult and humiliation to the plaintiff, then you may also allow damages to plaintiff's feelings for the insult, humiliation, and anxiety of mind suffered by him in consequence of such act." Further instructions were given on the subject of punitory damages. Exception was taken to that portion of the charge in regard to allowing damages for injured feelings, and also to a refusal to charge the contrary doctrine.

The views of the law so given to the jury were erroneous and prejudicial in several particulars, notably in the one specifically excepted to. Damages in a tort action are not divided into actual, compensatory, and exemplary. The term "compensatory damages" covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term "*compensatory* damages." "Compensatory damages" and "actual damages" are synonymous terms. Pecuniary loss is an actual damage; so is bodily pain and suffering. *Wilson v. Young*, 31 Wis. 574. The jury should have been told that plaintiff was entitled to recover full compensatory damages, and then instructed as to their elements in a case like this. If it were a case where recoverable damages in-

cluded injury to the feelings, the jury should have been made to understand that compensation therefor was a matter of right, not a matter in their discretion. When guilt is established in a tort action, whether exemplary damages should be allowed or not is submitted to the judgment of the jury; but not so compensatory damages.

In this case there was no physical injury to plaintiff, and no personal injury to him of any kind save to his feelings. The case does not fall within the few exceptions to the rule,— which prevails in this state and in most jurisdictions,— that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under the general principle applicable to tort actions that recoverable damages are limited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite causal connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured in a money standard by average human wisdom with a reasonable degree of certainty.

We will not go further in the discussion of the rule of damages. The law in regard to it, for this state, was, upon full consideration, declared in *Summerfield v. W. U. Tel. Co.* 87 Wis. 1, opinion by Mr. Justice WINSLOW. The general rule there stated is clearly applicable to this case. There are exceptions which will be found pointed out in the *Summerfield Case*, but they have no reference to a case of this kind.

The numerous exceptions saved by appellants might be discussed in much greater detail, but they are in the main covered by the foregoing. There were some propositions contained in the requests refused which were correct in the abstract, but unnecessary to the case because the facts were

not disputed, and immaterial because inapplicable to the facts. For the error in regard to the rule of damages the judgment must be reversed. No other reversible error has been discovered in the record.

By the Court.—The judgment of the superior court is reversed, and the cause remanded for a new trial.

MEINECKE, Respondent, vs. SWEET, Appellant.

February 3 — February 27, 1900.

Partnership: Contract: Mutual mistake: Compromise of suit: Rescission.

The parties were partners. The firm was insolvent and plaintiff was indebted to it. Pending an action by defendant for dissolution and the appointment of a receiver, the parties made an agreement by which defendant was to pay plaintiff $175 for his interest in the property and good will of the business and to assume and pay all existing indebtedness of the firm, no particular amount being specified. By mistake both parties supposed the indebtedness to be about $500 greater than it really was, but it appeared that the assets of the firm were considerably less than its debts and that defendant offered to pay the $175 as a compromise of his action, in order to save the expense of a receivership and the sacrifice of the good will. *Held*, that defendant was not bound to pay plaintiff one half of the $500, the amount in mistake, but plaintiff's only remedy was a rescission of the agreement.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The parties to this action were partners as fruit and produce commission merchants in the city of Milwaukee. The business was not profitable, and the firm became insolvent. In January, 1897, the defendant brought an action to dissolve the partnership and to appoint a receiver. While such action was pending, the parties entered into a written contract, wherein the plaintiff sold his interest in the property

and good will of the business to defendant for $175, and the latter agreed to pay all existing indebtedness of the firm, no particular amount being specified. Some months afterwards the plaintiff brought this action, claiming that in arriving at the basis of the said agreement a detailed statement of assets and liabilities prepared by the defendant had been used, which was supposed to be correct, but by some mistake it showed that a note of $491.25 had been included twice in the list of liabilities, and that the firm's debts which defendant was to pay were that much less than they had supposed; that but for this overestimate in the liabilities he would not have sold out for the price mentioned; that his interest in the good will and property of the firm was of the value of $666, instead of the amount he received; and that the defendant ought justly to pay him one half of the amount of such note.

The defendant answered, setting up the insolvency of the firm and of both its members, and that he believed that, if the business went into the hands of a receiver, the expenses would greatly exhaust the firm's assets and destroy its good will, so he offered plaintiff, as a compromise, $175 for his interest, to buy his peace, without regard to the amount of the liabilities.

Upon the trial it was shown that the statement of liabilities prepared by the bookkeeper, by mistake, included two notes of the amount mentioned, when it should have included but one. This statement showed liabilities, $4,121.65, and resources, $2,727.07; excess of liabilities, $1,394.58. Excluding the note, the liabilities would have exceeded assets but $903.33. The plaintiff testified that he relied on the statement mentioned, and would not have sold for the amount he did had he known the mistake. The defendant gave testimony tending to support his answer. Both parties moved for a direction of a verdict. The court directed a verdict for the plaintiff for one half of the amount of the note and

interest, and judgment was entered accordingly. Defendant appeals.

For the appellant there was a brief by *Elliott & Hickox*, attorneys, and *Charles T. Hickox*, of counsel, and oral argument by *Mr. Hickox*.

E. J. Patterson, for the respondent.

BARDEEN, J. There is no reason to doubt that both parties were mistaken as to the amount of the firm's liabilities at the time they made the contract of dissolution. The firm had been doing an unprofitable busines. The liabilities exceeded the available assets about $900, so that, independent of the good will of the business, neither partner would have had anything coming to him upon a final settlement. The proof showed that plaintiff was not only holden for the debts of the firm, but was also indebted to it in the sum of $130. A suit had been commenced by the defendant to dissolve the partnership and for the appointment of a receiver. The good will of the business was likely to be sacrificed, and the assets lessened by the expenses of the receivership. With this prospect before them, the partners got together and made a written agreement. By its terms, plaintiff conveyed to defendant all his interest in the property and good will of the business for $175. The defendant agreed to assume and pay all the indebtedness of the firm, and to pay plaintiff said sum of $175. So far as the proof shows, this agreement has been carried out to the letter. But it is said that, in arriving at this agreement, both parties labored under the mistake that the liabilities of the firm were about $500 more than they really were, and hence the law implies an obligation on the part of defendant to pay plaintiff one half of that amount. It was upon this assumption that the court directed a verdict for plaintiff. It is not claimed that the written agreement does not express the exact terms of their contract, but it is said there was a mistake in one subject matter of

the contract, but for which no contract would have been made, or, if made, the terms would have been different. The plaintiff claims, and the court decided, that, had the true facts been known as to the liabilities of the firm, defendant would have paid the plaintiff for his interest in the firm a further sum equivalent to one half of the amount in mistake. No such conclusion is proper, under the proof. The parties were in litigation. The assets of the firm were considerably less than their debts. The good will of the business was an unknown quantity. Independent of this uncertain item of assets, plaintiff had no valuable interest left. The expenses of the threatened receivership would have reduced their assets and increased their personal obligations. Plaintiff testified that the $175 paid him by defendant was for his share of the good will of the business. The only testimony on the subject is that the good will of the firm was worth from two to three hundred dollars. In view of their condition, defendant offered to pay the amount stated and assume the debts, as a compromise of the pending lawsuit, or, as he expresses it, "to buy his peace." It being conceded that, had the mistake been known, the contract mentioned would not have been made, in view of the facts stated, how can it be said that the parties would have made the contract assumed by the court? The facts clearly show that defendant's offer was purely a matter of compromise, and not the result of a mutual mistake in figures. Hence a direction of a verdict for plaintiff was clearly wrong, because it makes a contract for the parties which they did not make for themselves. Their minds did not meet upon this element of the contract, and we know of no rule of law that will permit the court to supply the hiatus. As stated in *De Voin v. De Voin*, 76 Wis. 66, a somewhat similar case, the only remedy of the plaintiff was to promptly rescind the contract and institute proper proceedings to that end. Especially is this true in cases where it appears that the result reached is a matter

of compromise, and not a result based upon errors in computation.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

TOWN OF MILWAUKEE, Respondent, vs. VILLAGE OF WHITEFISH BAY, Appellant.

February 3—February 27, 1900.

Taxation: Failure to collect: Charging town for taxes of village: Voluntary payment.

A village had for some years collected taxes independently of the town within whose limits it was situated. The separate property statements of the town and village clerks being before the county board, and a doubt having arisen as to whether the village had been legally incorporated, the assessment of relative values was made separately for "that part of the town not included in the village" and "that part of the town included in the village," and the state and county taxes were apportioned accordingly. The county clerk refused to deliver to the village clerk any statement of the taxes so apportioned to it, but attempted to deliver the same to the town clerk, and the result was that the village paid no part of said taxes for that year, nor were the same paid by the town. In the following year the county board charged back the said taxes to the town as an arrearage, with the penalty prescribed by sec. 1163, R. S. 1878, and the amount thereof was certified to the town clerk, who carried it into the tax roll, and it was collected and paid by the town. In an action by the town against the village to recover the amount so paid, it is *held* that the county board had no authority to charge the arrearage of the village to the town, and, the village not having requested the town to pay it, the payment was purely voluntary and there can be no recovery.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

H. K. Curtis, for the appellant.

For the respondent there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *E. A. Conway.*

BARDEEN, J. This case comes up on an appeal from an order overruling a demurrer to the complaint. The basis of the plaintiff's alleged cause of action may be stated as follows: The plaintiff is a duly organized town. The defendant is a village situated within the limits of said town, incorporated under ch. 391, Laws of 1887, in 1892. After its organization, it elected officers, exercised the power and authority of a village corporation as prescribed by law, and collected its taxes independently of the town from that time until the present. About the fourth Monday in August, 1896, the town clerk made a detailed statement of the several items prescribed by secs. 1050, 1066, R. S. 1878, and duly certified the same to the county clerk, but such statement covered none of the real or personal property of the village. About the same time the village clerk made a similar certification as to the property of the village. These statements were laid before the county board, and the usual assessment of relative values of property in the county was made by the board. About that time it began to be rumored that certain villages of the state incorporated under ch. 40 of the statutes were illegal, so the board made an assessment of the town under the name of "that part of the town of *Milwaukee* not included in the village of *Whitefish Bay*," and of the village under the name of "that part of the town of *Milwaukee* included in the village of *Whitefish Bay*." The board thereupon apportioned the state and county taxes to be raised, and the portion due on a loan by the state to the defendant, under the name stated, making a total of $2,830.96. Afterwards an application was made, and commissioners were duly appointed, under the statute, to adjust the relative valuations so made by the board, and it was determined by the commissioners that such valuations should be so changed that the total tax to be charged against the defendant was increased to $3,246.95. The county clerk refused to deliver any statement of the taxes so certified to the clerk of de-

fendant, but attempted to deliver the same to the clerk of the plaintiff, and the result was that the defendant paid no portion of said tax for the year 1896. The plaintiff disregarded the certification made to it, on the ground that the amount thereof, except $300 school tax, should have been collected by the defendant. In October, 1897, the county board adopted a resolution charging back $2,946.95 of said tax to the plaintiff, with the penalty prescribed by sec. 1163. At the annual meeting of the board, in November of that year, the usual apportionment of taxes was made, but, instead of charging the defendant with its arrearage as stated, the same was charged with the penalty to plaintiff, amounting in all to $3,683.69, and certified to the town clerk. He thereupon carried the amount into the tax roll, and it was collected by the town treasurer, and paid over to the county. A claim for this amount was made against the defendant by the town, but was wholly disallowed and repudiated. This action is to collect said amount, with interest and costs. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court held that it did, and it is that question we are to determine upon the defendant's appeal.

Whatever may be the moral aspect of the case we have no concern therewith. It must be determined upon cold and unsympathetic principles of law. A moral obligation will not, of itself, create a legal obligation in an action at law. There must be some legal duty underlying the moral burden to warrant the intervention of the courts. So far as we are able to ascertain, there is no reason stated in the complaint why the county clerk failed or refused to make the proper certification of taxes to the village clerk in 1896. It was certainly his duty to do so under the law, and his attempt to certify the same to the town was a void act, for which the defendant is not responsible. The defendant was a going corporation, acting under the forms of law,

and as such liable for its just share of the burden of taxation. No reason is given, nor can one be imagined, which will legally justify the failure of the county clerk to do his duty, or his unauthorized attempt to charge the town with the obligation belonging to the village. He was therefore clearly in default in the discharge of a duty imposed by law. The village was guilty of no miscarriage, because it had no basis upon which its officers could compute or collect its share of the tax for that year. It collected its taxes independently of the town, and had done so for some years prior thereto, and this fact must certainly have been known to the county officers. While it is not distinctly alleged that the village was acting independently of the town, that fact is a necessary inference from the allegation that it levied and collected its taxes as an independent organization. If this is so, then it would follow that the village would be directly responsible to the county for its delinquency, and not to the town. If such is the case, then, if losses are sustained by the county by the default of any county officer in the discharge of the duties imposed by law in the collection of taxes, under sec. 1157, Stats. 1898, such losses were chargeable to the county. If the village was not an independent organization for taxing purposes, then, when it was discovered that a portion of the territory of the town had been omitted from the roll, it might have been included therein the next year, under sec. 1059. Under any aspect of the case, we cannot discover any legal authority for the action of the county board in charging the arrearage back to the town. If there is any such authority, it has not been produced, and so far our researches have been unable to bring it to light. If there is no authority for such action, then there was no legal duty on the part of the town to pay the county this illegal item.

In the brief of the counsel for plaintiff we find this statement: "The action is not predicated upon any such wrong-

ful act or omission of the defendant. It goes merely upon the proposition that the plaintiff paid, under color of legal proceedings, money to the use of the defendant, which the latter, in equity and good conscience, should repay." This "color of legal proceedings" is said to consist in the resolution of the county board charging this delinquent tax to plaintiff. Without some legal foundation to sustain it, that resolution was as impotent as if the board had voted to charge the tax up to counsel in the case. There being neither semblance of right on the one hand, nor duty on the other, the whole proceeding is as purely voluntary as can be imagined. There is nothing in the complaint showing that defendant has done any act or made any request that the plaintiff should pay this money, and no circumstance is alleged, beyond the moral obligation of defendant to pay, from which any legal obligation can be inferred. No one can make another his debtor against his will, and a voluntary payment of the debt of another, without his knowledge or consent, the party being under no legal obligation to pay, will ordinarily be regarded a gratuity, and the money cannot be recovered back. *Beard v. Horton*, 86 Ala. 202. In order to enable one who paid money to the use of another to maintain an action for money paid, two things are essential: a legal liability on the part of defendant to pay the original demand, and his antecedent request or subsequent promise to pay. The request or promise need not necessarily have been express, and such request or promise, sufficient to uphold an action, will, in some cases, be implied when defendant's duty to pay is absolute. But when, as in this case, the facts alleged show that no such request or promise can possibly be inferred, the action to recover must fail. There are cases where money has been compelled to be paid by operation of law, as in *Ticonic Bank v. Smiley*, 27 Me. 225, or where the party has been compelled to pay another's debt in order to preserve his own property or

rights, as in *Nichols v. Bucknam*, 117 Mass. 488, and a recovery against the original debtor has been permitted. But such is not this case. The situation lacks the essential element of a showing of any facts or circumstances from which a request to pay or promise to refund can be inferred. The demurrer should therefore have been sustained.

By the Court.— The order of the superior court of Milwaukee county is reversed, and the cause is remanded with directions to enter an order sustaining the demurrer, and for further proceedings according to law.

MEISENHEIMER, Respondent, vs. KELLOGG, Appellant.

February 3 — February 27, 1900.

Action: Notice: Condition precedent or limitation? Waiver: Pleading.

1. A statute (in this case subd. 5, sec. 4222, Stats. 1898) requiring a notice to be given prior to the commencement of an action to enforce a common-law right does not prescribe a condition precedent to the cause of action, but is in the nature of a statute of limitations; and the objection that the notice was not given is waived unless taken by answer or demurrer. *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226, and *Ryan v. C. & N. W. R. Co.* 101 Wis. 506, so far as they hold to the contrary, overruled.
2. In such a case the objection that a sufficient notice was not given is not raised by a general demurrer, even though a copy of the notice given is annexed to and made a part of the complaint.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover damages for malpractice. The complaint alleges, in substance, that on and prior to the 23d day of August, 1897, the defendant was a physician and surgeon duly licensed to practice as such in the state of Wisconsin, and engaged in the practice of his profession in the

city of Milwaukee, and that he held himself out to the public as a skilful physician and surgeon; that on or about the 23d of August, 1897, the plaintiff employed the defendant as such physician and surgeon, for a compensation thereafter to be paid, to treat the plaintiff's left wrist joint, which was then swollen and painful, and that he submitted said wrist joint to the defendant for examination and treatment, and that the defendant did then examine and undertake to treat said wrist joint for the purpose of curing said ailment; that in the course of such treatment the defendant used and placed upon such wrist joint certain corrosive substances, medicines, and drugs, which destroyed the skin and tissues and a portion of the muscles; that said treatment was of no use or benefit, and was not proper treatment, but was negligent and careless treatment, and not in accord with the rules of any school of medicine or surgery; that the said drugs and medicines were highly deleterious, dangerous, and improper drugs and medicines to use upon said wrist, and were such drugs and medicines as physicians possessed of ordinary learning and skill, practicing in that vicinity, would not have used and employed in treating said ailment; that the defendant continued to treat said wrist from the 23d day of August until about the 10th day of November, 1897, but did not treat the same as frequently or in such a manner as the same ought to have been treated, or would have been treated by physicians possessing ordinary skill, residing in said vicinity; that because of the destruction of said skin, tissues, and muscles, caused by said unskilful and negligent treatment, the plaintiff has suffered much pain and suffering, and has been put to much unnecessary expense to effect a cure for said wrist, and has suffered a permanent injury to said wrist and to his left hand and arm, which has rendered him incapable of following his trade or doing any kind of work, whereby the plaintiff has suffered damage in the sum of $10,000; that on the 7th day of

July, 1898, the plaintiff caused a notice in writing to be served on the defendant, stating the time and place where such damage occurred, and the manner in which said injuries were received, and the grounds upon which the claim was made, and that satisfaction thereof was claimed of the defendant. A copy of said notice so alleged to have been served was attached to, and made a part of, the complaint.

The defendant demurred to the complaint on three grounds: (1) That the court has no jurisdiction of the subject of the action; (2) that several causes of action have been improperly united; and (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant appeals.

Geo. L. Williams, for the appellant.

John C. Kleist, for the respondent.

WINSLOW, J. But one ground of demurrer is insisted upon in this court, and that is the general ground that the complaint does not state facts sufficient to constitute a cause of action. Upon this question the decisions of this court in *Jones v. Burtis*, 88 Wis. 478, and *Crowty v. Stewart*, 95 Wis. 490, are quite conclusive in support of the complaint. All the allegations which were held sufficient in these cases to set forth a good cause of action for malpractice are contained in the present complaint, and it is not necessary to elaborate the question here.

But it is argued that the notice of the injury which is set forth in the complaint is insufficient, in that it does not set forth the place where the damage occurred (subd. 5, sec. 4222, Stats. 1898), and that the giving of a sufficient notice is a condition precedent to the cause of action, and hence that no legal cause of action is alleged. The radical difficulty with this argument is that the notice required by the statute above mentioned is not a condition precedent to the cause of action, but is merely a statute of limitation. The distinction

was clearly pointed out in the recent case of *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301. It was there stated, in substance, that a notice required to be given before the commencement of a purely statutory action (such as an action against a city for injuries resulting from a defective highway) is necessarily a condition precedent to the cause of action, because, the entire right of action being given by statute, it only comes into existence when the required notice has been given, but that a notice required to be given by statute prior to the commencement of an action to enforce a common-law right (such as the case now before us) is necessarily a statute in the nature of a statute of limitations, because the right exists without the aid of any statute. No argument in support of this conclusion would seem to be required. The right of action exists independently of statute. The requirement of notice within a certain time simply sets a new time limit within which a certain step necessary to enforce the right must be exercised. It is not a condition which must exist before any right comes into being.

This distinction was evidently overlooked in the cases of *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226, and *Ryan v. C. & N. W. R. Co.* 101 Wis. 506, where the notice required to be given by sec. 1816*b*, Stats. 1898, in case of the negligent killing of stock by a railroad company, was said to be a condition precedent to the maintenance of the action. In neither of these cases, however, was the question directly raised, nor was the attention of the court directed to it, but it was, in effect, conceded on both sides that the notice was a condition precedent; and the holding in those cases must now be considered as expressly overruled upon this point, as it was impliedly overruled by the conclusion reached in the *Relyea Case.*

Being a statute of limitation, the objection that the notice was not given must be taken either by answer or demurrer,

or it is waived. Stats. 1898, sec. 4206. Whether the objection can be taken by demurrer, under the present statute regulating the grounds of demurrer (sec. 2649), may admit of some doubt. The seventh subdivision of that section, which is the only one relating to the subject, provides for a demurrer on the ground "that the action was not commenced within the time limited by law." As will be readily seen, that is not precisely the objection sought to be raised here. But we are not called upon to decide this question now. If the statute has provided no demurrer for this cause, still the objection may be readily taken by answer, as was always the method at common law prior to the adoption of the Code. As no such objection is now raised either by answer or demurrer, the question of the sufficiency of the notice is not before us.

By the Court.— Order affirmed.

THOMPSON, Receiver, Respondent, vs. GROSS and others, imp., Appellants.

February 5 — February 27, 1900.

Banks and banking: Insolvency: Reorganization: Agreement of stockholders: Consideration: Discharge of stockholders' statutory liability: Parties: Receivers.

1. An insolvent bank was reorganized, certain of the stockholders executing and delivering to it an agreement to give to it their several notes to the amount of their respective holdings of stock, "to be used and collected only in case there is a shortage in present assets and cash to cover liabilities to creditors and for stock." Such agreement further provided that any payment on a note so given should amount to a discharge *pro tanto* of the payor's statutory liability as a stockholder. The bank resumed business and continued until it again became insolvent. *Held*, that the agreement did not, as regards creditors, take the place of the statutory

liability of the stockholders, and that an action to enforce the agreement according to its terms was properly brought by the receiver of the bank.

2. The fact that the creditors of the bank were not parties to the agreement did not render it invalid on the ground of a failure of the consideration that payment should discharge statutory liability.

3. Payments made under the agreement would constitute a trust fund to be so administered that the statutory liability of those signing the agreement would *pro tanto* be discharged; and the creditor beneficiaries could not participate in such fund except by releasing, *pro tanto*, their rights against the stockholders under the statute.

4. The reorganization of the insolvent bank, which was in the hands of a receiver, and its resumption of business on a plan which discharged, at the outset, a large part of the claims that were enforceable against the stockholders under the statute and released the bank assets from the trust for creditors and returned them to the control of the corporation, and the mutual promises of the stockholders who executed the agreement above mentioned in order to effect such result, constituted a sufficient consideration moving to said stockholders to support the agreement.

5. In an action against the stockholders who executed said agreement, for an accounting and to enforce the agreement, an allegation of the complaint that there is a deficiency of assets of the bank existing at the date of the agreement to discharge the liabilities therein mentioned, and that an accounting is necessary to determine the exact amount, sufficiently shows that the contingency mentioned in the agreement has happened, so that the action cannot be held, on demurrer, to have been prematurely brought.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action by the receiver of the Commercial Bank of Milwaukee, Wisconsin, to enforce the agreement mentioned in the complaint. Such complaint is to the following effect:

In 1894, the affairs of the Commercial Bank were, because of its insolvency, in part in the hands of a receiver in winding-up proceedings, and part in the hands of an assignee for the benefit of creditors. The statutory liability of the stockholders was wholly unsatisfied, and was, in whole or in part, required to satisfy the claims of creditors. All of the de-

fendants were stockholders, except Wyman K. Flint, administrator of John G. Flint who was a stockholder; and they held a majority of the stock, their respective holdings being as set forth in the complaint. In the situation mentioned, John G. Flint and the defendants, except Wyman K. Flint, proposed to the receiver of the corporation, and all persons interested, a plan for the resumption of business by the bank, the material points of which were as follows: an increase of the capital stock; the old stockholders to surrender their stock for cancellation and the same to be canceled; the persons holding claims against the bank assets to take stock in satisfaction thereof so far as they could be induced to do so; other subscriptions to be obtained and paid for in cash, sufficient to take all the stock of the bank not otherwise subscribed for. In order to protect the stockholders in the reorganized bank from loss on account of the old creditors, and to equalize the deficiency of assets of the old institution to meet old liabilities between the old stockholders participating in the reorganization, and for the purpose of inducing creditors and others to become parties to the scheme of reorganization by subscribing for stock, and for the further purpose of inducing the bank to resume operations according to the plan, the defendants, except Wyman K. Flint, together with his intestate, signed and delivered to the bank a written agreement which was in the words following:

"Milwaukee, Wis., February 21, 1894.

"We, the undersigned, stockholders of the Commercial Bank, for and in consideration of the resumption of the said bank, the efforts in that direction, and the mutual promises of one another, do hereby agree to execute and deliver to the Commercial Bank a note for the amount set opposite each of our names below, to be used and collected only in case there is a shortage in present assets and cash to cover liabilities to creditors and for stock,—each gives his note to amount of stock, but only one hundred thousand dollars

($100,000) to be paid thereon. It is further understood and agreed by and between said bank and each of the undersigned that the payment of the note executed by either of the persons signing this agreement, or any portion thereof, shall amount to a discharge to the amount of such payment of his statutory liability hereinbefore described."

Relying on such agreement, cash subscriptions for stock were obtained to the amount of $137,000 and creditors holding allowed claims took stock to the amount of $197,600; the remaining assets in the hands of the receiver and the assignee for the benefit of creditors were by legal authority released; the bank resumed business; and the plan of reorganization was fully consummated. February 26, 1897, the bank was duly placed in the hands of the plaintiff as receiver in winding-up proceedings. All the assets of the bank, except some of doubtful value, have been converted into money, and there is a deficiency, in the amount required to pay the debts, of more than $50,000. The assets mentioned in the agreement have proven insufficient to discharge the liabilities therein mentioned, by more than $50,000. Defendants have severally refused to comply with the terms of said agreement by contributing according to their holdings of stock in the bank before reorganization, the amount necessary to pay the last-mentioned shortage, and have severally neglected and refused to recognize their liability under such agreement, or to pay in any way any part of the statutory liability mentioned therein. An accounting is necessary to determine the exact amount which defendants should severally pay in compliance with such agreement.

The complaint was demurred to on several grounds, including insufficiency of facts to constitute a cause of action. The demurrer was overruled, and demurring defendants *Philip Gross*, *Ed. Aschermann*, *F. W Hartmann*, *A. L. Story*, and *Charles I. Kane*, as administrator of the estate of A. L. Kane, appealed.

For the appellants there were separate briefs by *W. J. Turner*, attorney for *Gross*, *Aschermann*, and *Hartmann; C. A. Koeffler*, attorney, and *Otto C. Baumgarten*, associate attorney, for *Story;* and *Geo. L. Williams*, attorney for *Kane;* and oral argument by *Mr. Baumgarten.*

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

MARSHALL, J. The following reasons are given in the several briefs filed by counsel for appellants, why the demurrer to the complaint should have been sustained: (1) The cause of action to enforce the statutory liability of stockholders is a personal right and cannot be prosecuted by the receiver; (2) the agreement set forth in the complaint is void for want of consideration; (3) the complaint fails to show that the contingency exists upon which the right to enforce the agreement depends. We will briefly examine each of such reasons.

1. It is a sufficient answer to the suggestion that the statutory liability of stockholders to creditors cannot be prosecuted by the receiver, as an asset of the bank, to say that such is not the purpose of this action. Arguments of counsel on that point are based on false premises. The plain purpose of the pleader in drafting the complaint was to state a cause of action for an accounting as regards the deficiency of assets of the bank existing at the time of the reorganization to satisfy the liabilities mentioned in the agreement, and to enforce such agreement to the extent of such deficiency, not exceeding, however, the sum of $100,000. The agreement is treated in the complaint as an asset of the bank for the purpose mentioned, not the statutory liability of the stockholders as such asset. The signers of such agreement, for the considerations named in it, became conditionally debtors to the bank to the amount of $100,000, apportioned between them according to their holdings of stock

in the institution. It was provided that if such indebtedness by the happening of the condition precedent became absolute, the fund accumulated therefrom in the hands of the bank should be applied to the particular purposes named in the agreement. The transaction did not, as regards creditors, take the place of the statutory liability of stockholders. Its purpose was to bind its signers to make payment to the bank, to the amount and on the contingency mentioned in it, and the bank or its receiver necessarily must enforce it, if at all, in accordance with its terms.

2. The reasons advanced in support of the contention that the agreement is void for want of consideration, do not successfully bear consideration. One suggestion is that the creditors, not being parties to the transaction, were not bound, hence the purpose and consideration of the agreement failed. There was no purpose to bind the creditors, as before indicated. The transaction was a plain matter of contract between the stockholders who signed the agreement, each acting for himself, on the one side, and the bank on the other. Whether the creditors were so bound that a payment to the bank on the agreement would, of itself, to the extent thereof, discharge the statutory liability of the payor existing at the time the agreement was made, is immaterial.

But it is said the bank was incapable of making good its promise that payments made pursuant to the agreement should *pro tanto* discharge the statutory liability of the payors. A proper understanding of the contract will clear up all difficulty on that point. The agreement that payments should *pro tanto* discharge statutory liability, impressed upon the obligations of the signers a trust for the purpose named therein. The scheme, plainly, was that any fund paid in upon the agreement should constitute a trust fund in the hands of the bank to be administered by it in such a way that the statutory liability of those who signed the agree-

ment, as such liability existed at the date of it, would be *pro tanto* discharged. The transaction created an express trust, the bank being the trustee. The creditor beneficiaries under the statute could not participate in the fund accumulated under the agreement except by releasing, *pro tanto*, their rights against the stockholders under the statute.

Every element of consideration mentioned in the agreement was valuable to the signers of it. Such elements consisted of the resumption on a plan that would discharge, at the outset, a large part of the claims that were enforceable against the stockholders under the statute, and the release of the bank assets from the trusts for creditors, and return of them to the corporation where they could be more economically administered; and the mutual agreements between the signers of the instrument to effect that result. The mere statement of the matter, in connection with the fact set forth in the complaint that nearly $200,000 of the indebtedness of the bank was canceled in carrying out the plan of reorganization, shows not only that there was a good and valuable consideration for the agreement, but that it moved to the signers thereof and was a full equivalent for their obligation to contribute, in proportion to their holdings of stock, to make up the deficiency of assets necessary to satisfy the liabilities mentioned in such agreement. On the part of the bank the consideration of the obligation of the signers of the agreement has been fully executed. When their obligation shall have been discharged by payment of the amounts agreed upon to the receiver, it will be his duty to administer the fund in accordance with the terms of the agreement, that is, so that all payments by the defendants will *pro tanto* discharge statutory liability that existed against them at the date of the agreement. It does not appear that that will be attended with any serious difficulty.

3. The further contention that this action was prematurely brought, the contingency of a deficiency of assets of

the bank existing at the date of the agreement to discharge the liabilities therein mentioned not having arrived, is sufficiently answered by referring to the allegation of the complaint that there is a deficiency of such assets of over $50,000, and that an accounting is necessary to determine the exact amount. The purposes of this action are to determine that question and to enforce the agreement accordingly.

It is not considered necessary to take up the various lines of argument of counsel, or to review the numerous authorities cited. They are all addressed to the three propositions above discussed. A few very simple questions are presented for consideration, and it is supposed that what has been said covers all of them that are of sufficient significance to call for special mention. The complaint states a good cause of action to determine the amount of the deficiency which the signers of the agreement obligated themselves to provide for, not exceeding $100,000, and to enforce their obligation accordingly. Each of the persons who shall be compelled to pay upon his agreement, will be entitled to have the amount so paid used in exact accordance with the understanding therein expressed.

By the Court.— The order is affirmed.

TEIPEL, Appellant, vs. MEYER, Respondent.

February 5 — February 27, 1900.

Contracts: Mutuality.

A contract by which an importer agreed to sell to a dealer certain brands of beer so long as the dealer should thereafter continue to buy said beers from him, but which did not bind the dealer to buy any of such beer, is not binding upon the importer, for want of mutuality.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

The complaint alleges that the parties to this action entered into an agreement whereby "the defendant agreed thereafter to sell and deliver to the plaintiff, at the city of Milwaukee, as the plaintiff should order and request, certain brands of imported beer" (naming them); that defendant was the sole importer; "that, by the terms of the said agreement, the said defendant promised and agreed to deliver to the plaintiff, at Milwaukee, in such quantities as he might from time to time demand, such portions of the said several brands of beer as the plaintiff might wish to purchase, and at the prices thereupon agreed therefor between the plaintiff and defendant, the said delivery to continue thereafter, and said beers to be delivered by the said defendant to the said plaintiff so long as the said plaintiff should thereafter continue to buy the said beers from said defendant;" and that defendant delivered certain quantities of beer about April 19, 1897. The complaint then alleges that defendant fitted up and opened a place of business in Milwaukee at considerable expense, and advertised his business; that about October 1, 1897, the defendant refused to sell plaintiff any more beer, and he was thereby prevented from carrying on his business, and suffered great damage. The answer admits that defendant was the sole importer of said beers, that he sold plaintiff some beer at two different times, and that he refused to longer deal with plaintiff, and denies the other allegations of the complaint. An objection to any evidence under the complaint, because it did not state a cause of action, was overruled. Plaintiff's testimony tended to support the allegations of the complaint. At the close of his testimony the court granted a nonsuit on the ground that the contract was not mutual. Judgment was entered for the defendant, from which the plaintiff takes this appeal.

For the appellant there was a brief by *N. S. Murphey* and *Herbert Kinne*, and oral argument by *Mr. Kinne*.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

BARDEEN, J. The complaint fails to state a cause of action, and the proof is not broader than its allegations. Summarized, the complaint states that defendant agreed to sell plaintiff certain brands of beer, "so long as the said plaintiff should thereafter continue to buy the said beers from the said defendant." It is an elementary principle in the law of contracts that, to be binding, they must be mutual. 7 Am. & Eng. Ency. of Law (2d ed.), 114; *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43; *Hoffman v. Maffioli*, 104 Wis. 630. There is no allegation or claim that the defendant was to furnish all the beer required by the plaintiff's trade, or that he should do so for any specified period, or that plaintiff was to deal in defendant's beers exclusively, or that the defendant should sell exclusively to plaintiff. The most important missing element in the contract is that the plaintiff does not promise to do anything. He may or may not continue to buy beer of the defendant, as he pleases. He is not bound to continue in business for a day, and is not bound by any promise to buy a single keg of beer. The contract was as clearly one-sided as it possibly could have been made. It had the effect merely to bind the plaintiff to receive and pay for such beer as he might from time to time order from the defendant. Further than this, it had no binding force, for want of mutuality. It comes clearly within the line of cases cited in 104 Wis. 630. As supporting the same principle, we cite the following cases: *Am. C. O. Co. v. Kirk*, 68 Fed. Rep. 791; *Davie v. Lumberman's M. Co.* 93 Mich. 491; *Bailey v. Austrian*, 19 Minn. 535.

By the Court.—The judgment of the circuit court is affirmed.

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117 *119

WARD, Appellant, vs. SWEENEY, City Clerk, and others, Respondents.

February 5 — February 27, 1900.

Temporary injunction: Discretion: Restraining intrusion into office: Pleading: Aldermen: Term of office.

1. The refusal of an injunction *pendente lite* is a matter resting in sound discretion.
2. A court of equity cannot try the title to a public office; and if it may by injunction protect the incumbent of an office against violent disturbance or usurpation by a claimant thereof, the case should be clear and urgent to justify such intervention.
3. The refusal of an injunctional order in an action by an alderman against persons claiming to be aldermen-elect is *held* not to have been an abuse of discretion, it appearing that the relief sought was merely the keeping of defendants out of office until their right should be legally established; that it was not probable that there would ever be any judgment in the case to be rendered unavailing in the absence of a temporary injunction; and that the injury to plaintiff or any one else from a change in the *status quo* would in no respect be greater than the injury to defendants and to the public from the temporary injunction should defendants' title ultimately be established,—the injury in either event being incapable of being measured in money so as to be protected by an undertaking; and it not being shown by the complaint that there was any real peril of turbulent or riotous disturbance of the orderly proceeding of the city government, and not clearly appearing that the defendants were not entitled to the offices claimed. *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436, distinguished. MARSHALL and BARDEEN, JJ., concur in the decision on the sole ground that it does not clearly appear from the complaint that the plaintiff was entitled to the office, and dissent from the opinion of the court in so far as it casts doubt upon or attempts to limit the power of a court of equity to protect a *de facto* officer in office from an intruder.
4. It is as pleadings that allegations are to be liberally construed, not as assertions of fact to support injunctions. For the latter purpose they should be carried no farther than the necessary force of their words, and in weighing them the court may use its knowledge of the counsel who prepared and the party who verified them.

5. How far the general provision of sec. 925—26, Stats. 1898, that aldermen shall hold office for two years, applies to the first aldermen of a city, elected after the beginning of the electoral year, and whether the word "year" in that connection means calendar year or electoral year, i. e. a period terminating with the third Tuesday in April following the regular time of municipal elections (sec. 925—28), not determined.

APPEAL from an order of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Affirmed.*

The city of the fourth class of South Milwaukee became such by virtue of sec. 98, ch. 287, Laws of 1897, it then being a village of more than 1,500 inhabitants. After receiving its patent, municipal election was held on the 30th day of June, 1897, and the aldermen then elected qualified as such, and entered upon their duties on the 6th day of July, 1897. At the time of the regular municipal elections in April, 1899, an election for aldermen was held, and a new set elected, who claimed their right to occupy the office on the third Tuesday in April following such election.

The plaintiff, one of the old aldermen, on behalf of himself and the other aldermen, commenced suit by service of a complaint, which alleged the foregoing facts, and that the defendant *Sweeney*, the city clerk, claims and pretends that it is his duty to deliver certificates of election in pursuance of said election, and that said aldermen insist that upon receipt of said certificates they will qualify and take their places as elected; that by reason of the premises there is a conflict of claims as to who are and constitute the rightful aldermen from and after the third Tuesday in April, and that the aldermen, if they receive their certificates of election, will intrude into the common council, and attempt to occupy the seats therein and to exclude the members now sitting, which acts plaintiff claims will be illegal and wrongful, and will provoke dissension and altercation among the citizens, obstruct public business, disturb the peace and quiet of the

residents of the city, and the plaintiff and other aldermen will sustain great and irreparable damage. The prayer is for an injunction, first, against defendant *Sweeney*, city clerk, enjoining him from issuing certificates of election; also against the several newly elected aldermen, enjoining and restraining them "from intruding into the office of aldermen, and from acting, or attempting to act, in that capacity during the terms of the aldermen now sitting."

Upon this complaint the plaintiff obtained an order to show cause, returnable before the Honorable JOHN C. LUDWIG, judge of the superior court of Milwaukee county, why, pending the litigation, the said defendant *Sweeney*, as city clerk, should not be restrained from issuing certificates of election to any of the newly elected aldermen, and why the aldermen themselves should not be restrained from intruding into the offices of aldermen of the city of South Milwaukee, or attempting to act as aldermen. Upon a hearing on the complaint said orders to show cause and the accompanying restraining orders were, by the superior court, "discharged and vacated, the plaintiff taking nothing thereby." From that order this appeal was brought.

For the appellant there was a brief by *Kelly, Kelly, Henning & Riley*, and oral argument by *John T. Kelly*. Where a constitutional provision or statute fixes a term of office at two years and until a successor is elected and qualified, such term cannot be reduced to less than two years. *State ex rel. Gibson v. Friedley*, 21 L. R. A. 634; *Atkins v. Fraker*, 32 Wis. 510; *Platteville v. Bell*, 66 Wis. 326; *Crovatt v. Mason*, 101 Ga. 246; *State ex rel. Williams v. Mayhew*, 21 Mont. 93; *State ex rel. v. Bader*, 58 Ohio St. 384. An injunction should be issued to protect actual incumbents of office in the exercise of their official rights and to prevent others from interfering until the title can be determined in a proper proceeding. Mechem, Public Officers, § 994; *Eckelkamp v. Schrader*, 45 Mo. 505; *Allen v. Dunlap*, 24 Oreg. 229; *Corning v.*

Troy I. & N. Factory, 40 N. Y. 191; *Broiestedt v. South Side R. Co.* 55 N. Y. 220; *Pioneer W. P. Co. v. Bensley*, 70 Wis. 476; *State ex rel. Jones v. Oates*, 86 Wis. 634; *Parsons v. Durand*, 150 Ind. 203; 10 Ency. Pl. & Pr. 891.

For the respondents there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*. An equity action is not a proper proceeding in which to test the title of the defendant aldermen to their offices. *Huels v. Hahn*, 75 Wis. 468; *Demarest v. Wickham*, 63 N. Y. 320; *In re Sawyer*, 124 U. S. 212; *Appeal of Gilroy*, 100 Pa. St. 5; *Osgood v. Jones*, 60 N. H. 543; *Cochran v. McCleary*, 22 Iowa, 86; *McDonald v. Rehrer*, 22 Fla. 198; *Muhler v. Hedekin*, 119 Ind. 481, 486; 3 Pomeroy, Eq. Jur. (2d ed.), § 1345; 2 High, Injunctions (3d ed.), § 1312; *Smith v. Myers*, 109 Ind. 1; *Sheridan v. Colvin*, 78 Ill. 237; *Poyer v. Des Plaines*, 123 Ill. 111; *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320. If injunction were the proper remedy the plaintiff is not entitled to it for the reason that the facts alleged by him show that the defendant aldermen are entitled to the offices. Secs. 925—16, 925—26, 925—28, Stats. 1898; Mechem, Public Officers, § 390; Throop, Public Officers, § 308; *Wright v. Adams*, 45 Tex. 134, 140.

DODGE, J. It is primarily contended by the respondents and conceded by the appellant that a court of equity cannot try the title to public office, and appellant insists that his action may be maintained as one to merely enjoin a public disturbance or an unseemly interference with those in fact exercising the duties of an office. The prominent facts alleged and the relief prayed are all of the former character. The contesting claims to the office are alleged, and the relief prayed is the enjoining of the city clerk from issuing certificates of election, and the enjoining of the aldermen-elect from intruding into the office "during the term of the aldermen now sitting." Neither of these forms of

relief would be justified by anything short of an adjudication that the defendant aldermen had not been lawfully elected to the office. The relief to which plaintiff might have been entitled upon the cause of action he now seeks to construe out of the complaint would not have included any injunction against the city clerk from issuing election certificates, and could only have included injunction against the aldermen-elect until their title to the office had been established by law. That is the utmost extent to which any of the authorities cited by appellant extend, namely, to justify the maintenance of an original suit in equity for an injunction pending legal proceedings and ancillary thereto. We need not, however, decide whether or not there may be facts alleged to justify some form of injunctional relief other than that demanded, for the case comes here, not upon demurrer, but on an appeal from the refusal of an injunction *pendente lite*, an order resting in the sound judicial discretion of the court below. Neither is it necessary to decide whether, in any case, a court of equity may intervene by injunction to protect one or the other of contending claimants for an office in possession and enjoyment thereof. On that subject the states differ radically. Some of the more leading authorities on both sides of the question are the following: *Huntington v. Cast*, 149 Ind. 255; *Parsons v. Durand*, 150 Ind. 203; *Brady v. Sweetland*, 13 Kan. 41; *Braidy v. Theritt*, 17 Kan. 468; *Guillotte v. Poincy*, 41 La. Ann. 333; *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320; *Sheridan v. Colvin*, 78 Ill. 237; *Poyer v. Des Plaines*, 123 Ill. 111; *Kerr v. Trego*, 47 Pa. St. 292; *Appeal of Gilroy*, 100 Pa. St. 5; *Goldsworthy v. Boyle*, 175 Pa. St. 246. Suffice it to say upon the general subject that it is a field which courts of equity should enter with their drastic injunctions with great hesitation. Even if such action is maintainable in the name of the individual, the interests to be affected are most essentially of a public char-

acter, and the interest of the individual, or coterie of individuals, in an office, especially in a legislative office, sinks into insignificance in comparison with the vast public interests to be affected by excluding therefrom those whom the popular will has designated. By such injunctions the most overwhelming expressions of popular will in favor of or against some policy may be thwarted, enough of the members of a city council — nay, even of the legislature itself — may be excluded to wholly reverse the true majority, and long enough to enable the issue of bonds or passage of acts which may have been the real subject of an election and been forbidden by the popular vote. Such a catastrophe is all the more possible because of the imperfect character of the evidence on which, under our practice, preliminary injunctions issue. The recklessness with which parties verify the most vehement pleadings and affidavits at times is appalling, and may well cause hesitancy in issuing perhaps ruinous restraining orders in reliance thereon. The law has provided machinery by the orderly progress of which the election and certification of public officers are to be had, and to those tribunals has delegated both the authority and power to act. If that machinery is inadequate to protect the rights of the people, it is for them, through the medium of their legislature, to correct its defects; and neither the authority nor the duty is upon the courts to seek to supply them. The legislature has not said that, in case of a contest in the forms prescribed by statute, nor even in case of proceedings by *quo warranto*, the officer whom the machinery of the law has declared by its certificate entitled to the office shall refrain from exercising its functions, and for a court to assume to so declare trenches closely upon the function of the legislature. *State ex rel. Jones v. Oates*, 86 Wis. 634. Yet to such extent go appellant's argument and remarks in some of the cases. We do not say that a court may not protect him who by the

statutory machinery is placed in the office against violent disturbance or usurpation by another having not the *prima facie* right, but that it must be a clear and urgent case in which the judiciary should feel obliged to supplement the methods and guards provided by the legislature.

The only question before us on this appeal, however, is whether the superior court was clearly guilty of an abuse of its discretion in declining to issue the injunctional order prayed in this case. That discretion is of the broadest, and is seldom interfered with. The latest of the very few instances of such interference in this court is the case of *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436. There the action of the trial court was reversed. It was there held that where the complaint states a cause of action for affirmative remedy, and judgment will otherwise be rendered fruitless, and the injury to the defendant or others likely to result from the injunction *pendente lite* is not serious in comparison with that to be suffered by the plaintiff in the event of denial, and if the rights of the party to be enjoined can be protected by an undertaking or otherwise, it is an abuse of discretion to refuse it. The court in that case was speaking of a temporary injunction ancillary to the relief sought in the same action, namely, the specific performance of an agreement to convey a patent which the insolvent defendant was threatening to convey away pending the litigation, from which great injury was liable to be suffered by the plaintiff, and from restraining which but trifling injury was likely to be suffered by the defendant, which was of a pecuniary character and might well be protected by a money security. In the case at bar the situation is very different. The right of the plaintiff to his office or his establishment therein could not be the relief to be ultimately obtained. Indeed, no final relief was sought, if we construe the complaint as we must in order to find any cause of action,—merely the keeping defendants out of office till their right

be legally established. There was no reason to suppose this action need ever proceed to judgment, for the proper statutory action in nature of *quo warranto* could obviously reach trial much sooner; it being entitled to special speeding, both by statute (sec. 3469, Stats. 1898), and by custom. So that there was no certainty, nor much probability, that there ever would be any judgment at all in this case, to be rendered unavailing in absence of the order refused. It is in effect a restraining order requested in one action because the judgment in another action, not yet begun, may otherwise be futile,—a purpose not recognized by our statute (sec. 2774), and not that present in *Valley Iron Works Mfg. Co. v. Goodrick, supra.* The place for the ancillary *pendente lite* injunctional order under our Code is *in* the principal action, the effectiveness of whose judgment is threatened, not in a separate suit, as in those jurisdictions where such order is not within the power of a common-law court. Further than this, the injury, either to the rights of the plaintiff or any one else, from a change in the *status quo*, was in no respect greater than that to the defendants and to the public from the temporary injunction should their title ultimately be established. In either event the will of the people, declared in the manner prescribed by law, would have been defeated if judgment ultimately went in favor of the excluded party. The injury in either event was one quite incapable of being measured in money, so as to be protected by an undertaking.

Again, the allegations of the complaint, upon which alone the application was based, are extremely feeble and general. They fall far short of establishing any real peril of turbulent or riotous disturbance of the orderly proceeding of the city government. They are all consistent with regular and orderly procedure such as the law contemplates, namely, the receiving of election certificates and the presentation of themselves for recognition by the authority constituted by law to recognize only the legal holders of the offices. They could

not intrude themselves into the offices of aldermen unless the mayor and city clerk recognized them as such, and surely, in the absence of allegation, the court was not to presume that such officers would act in breach of their duty. No threat is alleged, and a fair construction of the allegations goes no further than an assertion of a purpose to make claim for their seats in accordance with the alleged opinion of the city clerk as to their rights therein,—a course to be encouraged, rather than restrained. Regularity and *prima facie* title should be protected *pendente lite*, rather than the opposition to them. *Goldsworthy v. Boyle*, 175 Pa. St. 246. So far as this court has spoken, its policy is in favor of aiding, rather than restraining, the person holding the *prima facie indicia* of title, as against one in possession. *State ex rel. Jones v. Oates*, 86 Wis. 634. Respondents had the right to claim their offices,—at least, to ascertain whether they were excluded. The allegations do not show any knowledge in the person verifying the complaint, and most of them are of such a character as to make certain that they expressed only the conclusion or belief of the pleader. The force to be accorded allegations in a complaint, when sought to be made a basis for a temporary injunction or other drastic process, is very different from that to which they are entitled in deciding on the sufficiency of the pleading when assailed by demurrer. In the latter case they justify only the procedure of the suit, and impose no harm on the other party, save submitting to an investigation and trial of the facts. When, on the other hand, it is sought to invade the liberty of action of a party, without trial, upon the complaint as an affidavit, allegations should be carried no further than the necessary force of their words. It is as pleadings that allegations are liberally construed, not as assertions of fact to support injunctions. The court was entitled to use his knowledge both of counsel who prepared and of the plaintiff who verified this complaint, in weighing the very cautious alle-

gations as to imminent peril therein contained, and presumably did so, and reached the conclusion that, if there were any real threats or imminent peril, they would have been made to appear more clearly.

Another consideration, doubtless of weight with the superior court, was that it by no means clearly appeared that the title of the defendants to the offices was not full and legal. The construction of the general city charter as to the time of termination of plaintiff's term of office is subject to vigorous opposing arguments. On the one hand, it is said that sec. 26, ch. 326, Laws of 1889, amended by sec. 2, ch. 70, Laws of 1897, provides that all officers shall hold their offices for one year, except justices and aldermen, who shall hold for two years and until their successors are qualified; that this language is unambiguous, not open to construction, and protects the plaintiff in his seat until July 5, 1899, also, as a corollary, until the third Tuesday in April, 1900, because by other sections his successor must take office on the third Tuesday in April following his election, which must be on the first Tuesday of some April, and therefore he cannot be lawfully elected until an April subsequent to July 6, 1899. On the other hand, argument is made that the statute relied on (now sec. 925—26, Stats. 1898) relates to officers in a going city; that its application to the first officers, elected in the midst of an electoral year, conflicts with the general scheme of city government and elections, requiring all cities to hold their elections on the first Tuesday in April; that such officers are anomalous, and could not have been intended by the legislature to be regulated by these general provisions; that the declaration of a two-year term could not have been intended to apply to them, because they could not hold two years by any possibility,—elected in July, they must hold either one year and nine months, or two years and nine months, since successors must take office in April. It is also pointed out that plaintiff, as well as

every one else, has recognized the inapplicability to the sporadic first officers of the general provisions of the charter; for he considered himself and the other officers entitled to take office immediately on his election, in July, instead of in the April and May following his election, as commanded by sec. 925—28. This idea finds support in *State ex rel. Williams v. Mayhew*, 21 Mont. 93, where the first commissioners of a new county were held free from the constitutional requirement that all county commissioners should hold for a term of four years, as their situation is exceptional, and application of the provision to them would confuse the general scheme and prevent the uniformity among counties which the constitution sought to promote. Similar reasoning appears in *Wright v. Adams*, 45 Tex. 134, 140. It is further pointed out that the legislative policy evidently originally contemplated that the tenure of the first officers should extend only to the end of the first and second electoral years, but that by confusion among amendments the express words effectuating that policy as to aldermen were allowed to disappear from the statutes under circumstances precluding any intention to change the policy itself.

The question also suggests itself whether the word year in this charter, and in other parts of the statute relating to terms of office, means calendar year, or an electoral year, so to speak,—a period terminating with the third Tuesday in April following the regular time of municipal elections. The latter view receives support from the fact that, throughout the history of the state, officers under such statutes have not held for full calendar years. Where the terms commence on a specified day of the week, they have always terminated at the end of 364 days or 728 days, in six years out of every seven, and the seventh year they have extended over 371 days. If the word "year" be used in this sense, of course plaintiff would have held office for two years on the third Tuesday of April, 1899.

We refrain, however, from any expression of opinion as to the correctness of either of these contentions; for otherwise we should, in effect, pass on the question of title to the office, which all the authorities agree would be unseemly and improper in this form of action. Suffice it to say that there were numerous considerations of public right and convenience, of comparative injury to the respective parties, and of possibility of protecting any rights by restraining orders or otherwise within a suit properly brought for adjudication of title to the offices, on which the discretion of the superior court might properly have passed, and that we do not discover such abuse of that discretion as to warrant a reversal of his conclusion, especially now, when the contested term is so nearly at an end, and when there has already been such abundant time to have obtained a final adjudication of the parties' ultimate legal rights, if there is in good faith a real contention between them.

By the Court.— Order appealed from affirmed.

MARSHALL, J. I have serious doubts as to the correctness of the decision rendered in this case, and dissent from some of the reasoning upon which it is based. Such reasoning, in my judgment, may seriously embarrass the court hereafter if it goes entirely unchallenged at the start.

There is no doubt but that the pleader did not fully understand, when he drew the complaint, that the equitable remedy of an incumbent of a public office, against a person deemed by him to be an unlawful claimant of the franchise and about to intrude himself into the position, is limited to preventing such person from performing the duties of such office or interfering with performance of such duties by the incumbent, till such person shall have secured an adjudication of his right at law. The remedy cannot be used to try the title to the office, directly or indirectly. Nevertheless, the complaint was broad enough for such relief as is obtainable

in equity under the circumstances stated. It was treated in that way in the court below, and we may say has received like treatment in the opinion of my brethren; but most of the reasoning of such opinion, as it seems, bears on the existence of the power of a court of equity to act at all in such cases, and the propriety of exercising the power if it does exist.

Nothing should be said, in my judgment, that may be construed into a denial of the power of a court of equity to prevent a person, claiming to be entitled to an office, from proceeding to obtain possession thereof or of those things appertaining to the performance of its duties, as against a *de facto* officer with reasonable ground for his claim to be the rightful official, in any other way than that provided by law.

Though it will not be discovered by the casual reader, and may not be by the profession generally, I understand the decision of the court to be really grounded on the idea that, admitting all the facts alleged to be true, it is quite doubtful whether plaintiff is entitled to the office at all,—whether the facts alleged would be effectual against an action of *quo warranto*. In that view only, I am not prepared to say it was an abuse of judicial discretion on the part of the court below to refuse temporary relief, and with such view I participated in the decision of this court.

Assuming that the facts alleged, if true, show that plaintiff is entitled to the office, I cannot subscribe to anything said in the opinion that casts doubt upon the power of the court, by an entirely independent action in equity, to protect him in the possession of the office and the undisturbed performance of its duties, till his adversary shall have caused his right to be established at law.

It is said in the opinion that numerous cases therein cited go no further than to sustain such an action as ancillary to an action pending at the same time to try the title to the

office. An examination of such cases will show that they were independent actions, and that not one of them was ancillary to another action pending to try the title to the office. *Brady v. Sweetland*, 13 Kan. 41, is a fair sample of all. That was an independent action by the incumbent of an office who claimed to be rightfully there and entitled to continue, against a claimant to prevent him from exercising the duties of the office till he instituted an action and established his right at law. A temporary restraining order was denied in the lower court, and such denial was reversed on appeal upon the theory that the right to the remedy was absolute under the circumstances, and that to deny the temporary relief in effect denied the right to such remedy. There is a multitude of authorities to the same effect. None of them says that the remedy is ancillary only to a pending action to try the title. The very purpose of the remedy is to enable a person in office to compel the person claiming a right thereto to bring an action and have such right established at law before attempting to obtain possession of the office or to perform its duties. The idea that the remedy can only be resorted to in aid of a pending action of *quo warranto*, in my judgment, has no support. On the contrary, in the circumstances under discussion, the cases cited in the opinion of the court show that the subject of preventive relief in an action brought for that purpose only, entirely independent of any other action, is one of the well-understood subjects of equity jurisdiction. It is so laid down in the elementary books, without criticism by the authors, and without citation of authorities except those supporting the jurisdiction and the exercise of it. Beach, Injunctions, § 1380; High, Injunctions, § 1315.

I cannot subscribe to the idea, either, that the court should hesitate to use its equity power to protect a *de facto* officer in the circumstances stated, where the facts alleged by him support his position and there is some reasonable probability

of the existence of such facts. The danger to public, as well as to private, interests from allowing claimants of public offices to forcibly intrude themselves into the same, or to exercise the duties of the positions in hostility to *de facto* officers already in such positions, is very great, and should be prevented in every practicable way. The injunctive remedy to that end should be used freely when there is a clear case calling for it. It is the only remedy that can be resorted to to compel a determination of the right to the office, under such circumstances, by peaceful methods. The right idea was expressed in *Palmer v. Foley*, 4 Jones & S. 14, where it was said, in effect, that a *de facto* officer has no need to institute an action of *quo warranto* to try the title to the office or to protect his possession. It is the business of the claimant, who is trying to break in, to resort to that remedy. The person claiming to be rightfully in the office may use the physical remedy to prevent being dispossessed, or he may resort to the more peaceful remedy in equity by injunction to protect his possession; but the latter should be preferred, and the court should do nothing to encourage a resort to the former. The court said: "The earliest jurisdiction, if not at that time the chief business of the court of chancery, was to prevent assaults, trespasses, and a variety of outrages. . . . And the jurisdiction, in cases of trespass to property, has been continued to the present time, and is sustained upon the principle of irreparable mischief." Speaking of the case in hand, the court said, in substance, the jurisdiction to protect the incumbent was of the same nature as that to protect the possessor of property against trespass upon his rights resulting in irreparable mischief. No exact limitation is placed upon the jurisdiction in this class of cases. The equity power of the court to avoid the mischiefs of personal conflicts over the possession of an office, or of two persons attempting to perform its duties at the same time to the detriment of public interests and the

disturbance of the public peace, ought to be and is the same as regards preventing unlawful violations of his rights of property, and the course of a person in resorting to that remedy, in all proper cases, should be commended and sustained. See, also, *Sullivan v. Haacke*, 5 Ohio N. P. 26.

That is the doctrine that underlies all the cases cited in the opinion of the court where the jurisdiction of equity was exercised. Can there be any doubt but that the method, often adopted, of forcibly taking possession of an office, or of a claimant exercising its duties while another incumbent of the office still claims the right to perform such duties, with some reasonable ground for such claim, should be condemned, and that the only peaceful remedy, whereby the incumbent of an office can protect his possession and the public interests till the right is decided at law, should be encouraged?

I cannot subscribe to the idea that there is any substantial conflict in the adjudications, either as to the power of the court or advisability of its exercise in cases like this. An examination of the cases cited in the opinion of the court to sustain the suggestion that there is such conflict, will demonstrate that they are in substantial harmony where the person in possession was a *de facto* officer. The idea that they are out of harmony comes from not distinguishing between *de facto* officers and mere usurpers, and the exercise of equity power to prevent interference with a person in possession of an office from its exercise to try the title to the office or to restrain such person from performing its duties. In the first class of cases the jurisdiction is sustained; in the last two classes the right is denied. The distinction is easily understood, and, as indicated, the cases cited will generally be found in harmony if that distinction be kept in mind.

To illustrate, in *Parsons v. Durand*, 150 Ind. 203, it is said injunction is the proper remedy when one occupying

an office seeks to stay the intrusion of another claimant into the office until title has been determined at law, while in *Harding v. Eichinger*, 57 Ohio St. 371, it is said injunction will not lie at the suit of a claimant to a public office who is out of possession, against an adverse claimant who is in possession; that while the incumbent is entitled to that remedy to protect his position against interference by an adverse claimant, until the latter establishes his right, such claimant is not entitled to such remedy against the person in possession of the office; that the sole remedy of the adverse claimant is an action at law to try the title to the office. *Goldsworthy v. Boyle*, 175 Pa. St. 246, and *Appeal of Gilroy*, 100 Pa. St. 5, were both actions in equity to try the title to an office.

I cannot subscribe to the idea that the second aldermen had a *prima facie* right. My brethren probably did not intend to decide that way, but there are several expressions in the opinion of the court that pretty clearly convey such idea. We cannot say that the adverse claimant had a *prima facie* right merely because he held a certificate of election, unless we say that the charter authorized an election for aldermen at the time such adverse claimant was elected, and that is what the court does not intend to decide in this case.

Neither can I subscribe to the application made of the doctrine of *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436. The idea plainly expressed in that case is that if a person, on the facts alleged, be clearly entitled to a particular remedy, and there be reasonable ground to apprehend the facts may be established by proof, and without a temporary restraining order preserving the *status quo* till the termination of the litigation the purpose of the action will be entirely defeated, such temporary restraint should be applied under such circumstances as to reasonably protect all parties to the litigation. My brethren are made to say here

that such a situation was not presented in this case because, there being no action pending to try the title to the office, there was no certainty of a judgment that would be rendered ineffective for want of temporary relief preserving the *status quo* during the litigation. In that there is failure to perceive, as it seems, that the temporary relief referred to in the rule is ancillary to the relief sought in the action where such temporary relief is granted, not to relief in some other action. If the sole purpose of an action be to restrain a defendant from doing some act, and the right to that remedy is plain and will be entirely lost unless temporary restraint be granted to last till the final judgment can be obtained in the action to enforce such remedy, because in the meantime the very mischief aimed at will have been accomplished, it must be plain that a denial of the temporary relief to prevent such a contingency is in effect a denial of the ultimate relief asked. For that reason it is held that judicial duty requires the preservation of the *status quo* pending the litigation, on such terms as will be just to both parties. That is the law as laid down in the books generally, as will be seen by a study of the *Valley Iron Works Case.*

I subscribe to all that is said in the opinion of the court as to the care that should be exercised in granting injunctive relief, but we must not lose sight of the fact that judicial power in that regard is absolutely essential to the effective exercise of equity jurisdiction to the end that the property and personal rights, public and private, may be adequately guarded. There is no danger to be apprehended from the proper use of that power. It is inconsiderate use of it that works mischief. Where a person alleges facts constituting a cause of action and shows, reasonably, that the allegations are true entitling him to the specific relief asked, and the case is one that a court of equity ought to entertain to the end that such relief may be obtained, and the purposes of the action will be entirely defeated without temporary re-

straint upon the defendant pending the litigation, it is plain to a demonstration that such restraint should be applied. The right to maintain the action and the right to preserve the *status quo*, so as to render the final decree effective to accomplish the purposes of the action, are inseparably connected together. So here, if it were certain that the facts alleged entitle plaintiff to the office of alderman, the allegations showing clearly that the defendant, without securing an adjudication of his right at law to such office, will, unless restrained by the court, intrude into the office and interfere with plaintiff's administration of it, such plaintiff's right to the equitable remedy would be clear, and his right to have such restraint put upon the conduct of his adversary as will prevent the threatened mischief occurring before it can be remedied by the final decree, would be as clear, the temporary restraint, of course, to be applied under such circumstances as to protect, so far as practicable, the interests of both parties to the litigation.

Unless it be understood that courts of equity have, and will freely and vigorously exercise, when occasion requires, the power here discussed, to prevent the mischiefs of physical and other unlawful contests over offices, including that which exists where there is a *de facto* officer in office, performing its duties, and another endeavors at the same time to perform such duties, each claiming and endeavoring to force from the other, and the public, recognition of his claim, such mischiefs will be encouraged by the want or weakness of peaceful remedies. There is no such weakness. The court, as the supreme and rightful arbiter of all such disputes, has ample power to do its work speedily and efficiently, and to prevent the mischiefs that characterize efforts to otherwise settle such disputes.

No one can tell how soon the power we confidently assert courts of equity possess may necessarily be called into activity in respect to some important office. To cast

doubts upon the existence of the power or propriety of exercising it in this rather unimportant case, if the facts existed to warrant such exercise under the restraints and within the limitations to which we have referred, would create an unfortunate precedent. Nothing here said, regarding the exercise of the power discussed, is intended to apply to a mere usurper of an office.

As before indicated, solely upon the ground that it does not appear to a moral certainty that, conceding all the facts set forth in the complaint to be true, plaintiff was entitled to remain in the office of alderman, I am able to come to a conclusion that the trial court properly declined to grant a temporary restraining order.

BARDEEN, J. In so far as the decision in this case attempts to limit the power of a court of equity to protect a *de facto* officer in office from an intruder, I think it runs counter to the great weight of authority. The opinion admits the existence of the power, but the discussion confines it to such narrow limits as leaves scarcely a vestige of it. As noted by my brother MARSHALL, the courts have no hesitancy in exercising it in a proper case, and we need have no fear that any harmful results will follow from it. I admit with some hesitancy that the facts in this case do not clearly show a situation where such power should be exercised, but I cannot admit that the power of the court is confined to any such narrow limits as designated. There are also some expressions in the opinion which would seem to indicate that the court will only interfere in aid of pending or prospective litigation. Such is not the rule, as I understand it. I put my concurrence in the affirmance of the order appealed from on the sole ground that it does not clearly appear that the plaintiff was entitled to the relief sought, and we cannot say, with confidence, that the court below was guilty of a breach of judicial discretion in denying the temporary relief sought.

ATWATER, Respondent, vs. MANVILLE, Appellant.

February 6 — February 27, 1900.

Gambling contracts: Partnership: Contribution for losses.

In an action by one partner against his copartner to recover one half of the losses of the business, the evidence — showing, among other things, that the firm started business with no capital stock and never kept any books, and that within a few months it had several hundred different transactions with commission firms doing business on the board of trade in Chicago, in which millions of bushels of grain, etc., were bought and sold, without delivery or any offer to deliver a single bushel thereof, the transaction in every case being settled by the payment of differences — is *held* to show, in spite of plaintiff's testimony that deliveries were contemplated, that the partnership was formed to conduct, and had conducted, a mere gambling business, for the losses in which no contribution could be enforced.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action by one alleged partner against his copartner to recover one half of the net losses of the partnership business. The complaint, in effect, alleges that a partnership was formed between the plaintiff and the defendant on or about March 1, 1891, to engage in the purchase and sale of wheat in Milwaukee and Chicago, upon an equal division of profits and losses; that pursuant thereto large sums of money were paid out by the plaintiff in the partnership business, amounting to $29,466.87, from his own individual funds, and that he had only realized to apply upon such payments $2,157.16, including all sums advanced to him by the defendant; and that the balance, amounting to $27,309.71, was the total net loss, the whole of which had been paid by the plaintiff, and one half of which he claims to recover of the defendant in this action. The answer denied that there was any partnership, and further alleged that there were

several distinct and separate deals on the board of trade at Chicago, conducted by the plaintiff on behalf of himself and the defendant, each of which was, however, fully settled between them. The answer, in effect, further alleged that all the dealings in which the plaintiff and the defendant were engaged were gambling transactions, and that all the transactions set forth in the complaint were gambling transactions carried on upon the board of trade in the city of Chicago, Illinois. The answer also pleads the statutes of Illinois in regard to gambling contracts, and alleges an accord and satisfaction.

The case was tried by the court, and the evidence showed that all the alleged partnership transactions consisted of transactions upon the board of trade, and that they were all conducted by the plaintiff, *Atwater*. The firms through which the alleged business was done were several board-of-trade firms in the city of Chicago; and the alleged business, consisted of the purchase of wheat, oats, corn, lard, and other produce during the months of May, June, and July, 1891, to the amount of several million dollars, none of which produce was, however, delivered, but settlements were made by the payment of differences. The court found that a partnership existed, and that the business in which it was engaged was legitimate commercial transactions, and not gambling transactions, and rendered judgment for the plaintiff against the defendant for one half of the advances made by the plaintiff with interest, from which judgment the defendant appeals.

Nathaniel S. Robinson, for the appellant.

For the respondent there was a brief by *N. S. Murphey*, attorney, and *Herbert Kinne*, of counsel, and oral argument by *Mr. Kinne*.

WINSLOW, J. There is sufficient evidence to support the finding of the trial court to the effect that a partnership was

formed between the parties on or about March 1, 1891; therefore we shall not spend any time upon that question, but proceed at once to the question whether the evidence supports the conclusion that such partnership was formed for the purpose of transacting a legitimate business.

The legal principles applicable to board-of-trade transactions are well settled. Contracts in form for the sale and purchase of commodities, where neither party intends to deliver or accept the property nominally sold, but where it is intended by both parties that the transaction shall be settled by the payment of differences in price according to the rise and fall of the market, are gambling contracts, and void. *Lowry v. Dillman*, 59 Wis. 197; *Wall v. Schneider*, 59 Wis. 352; Laws of 1883, ch. 81; Stats. 1898, sec. 2319*a*; *Jamieson v. Wallace*, 167 Ill. 388.

The doctrine is elementary that an action will not lie for the purpose of obtaining a division of the profits, or enforcing contribution for the losses, of a partnership formed to conduct, and which has actually conducted, an illegal business. Bates, Partnership, § 119. If, therefore, this partnership was formed for the purpose on the part of both parties of carrying on a gambling business on the board of trade, and the losses shown resulted from the transaction of such gambling business, there can be no recovery. It is true that the plaintiff testified that delivery was contemplated in all of the transactions. We are satisfied, however, that the evidence shows beyond a peradventure that nothing was contemplated, either in the partnership agreement or in the trades themselves, save settlements of differences. All the circumstances point that way. The plaintiff had some means,—perhaps $100,000,—and the defendant had nothing save a salary of $100 a month. The firm started with no capital stock, and no books were ever kept. Between March and July it had more than 300 different transactions with commission firms, in which in the neighborhood of 8,000,000

bushels of wheat, 80,000 bushels of corn, 355,000 bushels of oats, 1,000,000 pounds of ribs, and $19,500 worth of lard were either bought or sold, involving millions of dollars; but there was never delivered, or offered to be delivered, a bushel of grain, or a pound of lard, or a solitary rib, but in every case the transactions were settled by the payment of differences. Such facts have been uniformly held by the courts as stamping upon the transactions the character of gambling contracts. *Jamieson v. Wallace, supra; Beveridge v. Hewitt*, 8 Ill. App. 467; *Wheeler v. McDermid*, 36 Ill. App. 179; *Flagg v. Baldwin*, 38 N. J. Eq. 219. That the parties contemplated just such transactions as these when their partnership was formed, we entertain no doubt, from the evidence. It would not be useful to rehearse the facts at any greater length. They all point one way. The parties contemplated gambling in prices, and nothing else. They did just what they contemplated. The law will help neither party, but leave them where it finds them.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment dismissing the complaint.

NICOUD, Respondent, vs. WAGNER, Appellant.

February 6 — February 27, 1900. |106 112| 67 [141]

Appeal: Reversal for want of evidence: Master and servant: Injury from defective machinery: Evidence: Hypothetical questions: Leading questions: Excessive damages.

1. On appeal a judgment cannot be reversed for want of evidence to support the verdict on which it is based, unless it clearly appears that there is no credible evidence which, in the most favorable view that can reasonably be taken of it, will support the verdict.
2. In an action for personal injuries alleged to have been caused by defects in a traveling crane in the factory in which plaintiff was

employed, it is *held* that the evidence was sufficient to support a finding by the jury to the effect that the crane in use at the time of the accident was the same one that had previously been reported to defendant as defective and unsafe, and also findings that the crane was in fact defective and that its defective condition was the proximate cause of the injury.

3. The evidence is *held* also to have justified the inclusion, in hypothetical questions, of the element of plaintiff's insensibility shortly after the accident.

4. Considerable strictness should be exercised in excluding leading questions put to expert witnesses; but errors in allowing such questions to be answered will not work a reversal unless prejudicial to the appellant.

5. A man forty-four years of age, capable of earning $30 per month at ordinary labor and $75 per month at his trade, was by an injury permanently incapacitated from working at his trade and, in a considerable degree, from working at manual labor at all. The bones on one side of his face were fractured, and the sensory nerve materially and permanently injured, and his brain affected to some degree, permanently. *Held*, that an award of $3,500 as damages was not excessive.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action for personal injuries. Plaintiff, while working for the defendant in a structural iron works, was struck and severely injured by the end of a heavy iron beam, suspended several feet from the floor of the factory by a chain attached to a traveling crane, operated by fellow-servants to raise the beam to a sufficient height to enable them to move it to an overhead track running at right angles to that on which the crane was located, there to be moved by another appliance, called an "air hoist," to and through a riveting machine. The claim on the part of the plaintiff was that the crane was insufficient, out of repair, and unsuitable for the work with reasonable safety to employees required to labor in the vicinity thereof; that defendant had notice of the fact; that plaintiff was ignorant of it; that by reason of the use of the defective crane the iron beam was caused to make an unexpected

movement whereby it reached to where plaintiff was working, in the due performance of his duties and in the exercise of reasonable care, and struck him, causing the injury complained of. The claim on the part of the defendant was that the crane was in a reasonably safe condition; that the movement of the beam when it struck and injured plaintiff was caused by the lift chain not being attached to the center of the beam as regards weight, or the way the work was done by plaintiff's fellow-servants, or by plaintiff's negligence.

The following facts were established without substantial controversy: Plaintiff and one or more associates constituted what was called the "setting-up gang." Their work consisted of setting up parts of iron beams or columns into proper forms, and fastening them together with bolts ready to be taken by the riveting gang to the riveting machine by means of the crane and air hoist. There was a pile of columns prepared, as aforesaid, lying on skids under an overhead track on which the crane was operated. The pile was from four to six feet high. Plaintiff was a few feet north of the west end of the pile, unscrewing a bolt in a column that lay on a car resting on a track that ran parallel with the pile. The riveting gang consisted of four persons. Their duty in moving a column from the pile to the air hoist was to place the crane over the center of the pile by moving it on the overhead track; then to engage a hook, attached to the crane pulley at the lower end of the lifting chain, in a chain placed around the center of the column; then, by drawing on the operating chain, to produce the necessary motive power to raise the column free from the pile; and then, by pushing the chain toward the air-hoist track, cause the crane with its load to go to such track.

On the occasion in question, two of the riveting gang, by operating the crane, lifted a heavy column, some eighteen feet long, from the pile. When the column was clear of the pile the west end swung north and in some way struck

the plaintiff's head and severely injured him. There was evidence to prove that one of the crane chains slipped, causing the column suddenly to drop and swing toward where plaintiff was working and strike him, or that the column swung over plaintiff and that the chain then slipped, allowing it to drop and strike him. There was also evidence that a crane on the same track, some days before, operated in the same way, and that the cause was a worn condition of some of the working parts of the device, or the loosening of a setscrew that held one of its wheels in position; that defendant had ample notice of those facts, and that they rendered such an accident as the one that occurred liable to happen. That evidence was disputed. There was also evidence tending to show that the crane in use at the time of the accident was in perfect condition, and that if there was negligence which caused the swinging or dropping of the iron beam, with the consequences complained of, it was wholly in operating the crane. There was evidence that it was the duty of the riveting gang to steady the beam as it was hoisted, and to prevent it from swinging, and that on the occasion in question that was neglected.

At the close of the evidence defendant's counsel moved the court for the direction of a verdict, which was denied, due exception being taken to the ruling. The jury found specially, in substance,—

(1) Plaintiff was injured while in defendant's employ by being struck on the head with an iron beam.

(2) The crane by which the beam was hoisted was so defective as to be insufficient when operated with ordinary care.

(3) Defendant knew, or ought to have known, of the fact found in question No. 2, a sufficient length of time before the accident to have prevented it.

(4) Plaintiff, before the time of the accident, was not chargeable with knowledge of the defective condition of the crane.

(5) The defective condition of the crane was the sole proximate cause of the plaintiff's injury.

(6) The crane was operated with ordinary care.

"We assess the plaintiff's damages at $3,500."

There were several other findings, but they were not inconsistent with the foregoing, and are not material to the questions discussed in the opinion. Judgment was rendered on the verdict in plaintiff's favor.

For the appellant there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*.

J. C. Officer, attorney, and *J. W. Wegner*, of counsel, for the respondent.

MARSHALL, J. The most important question presented on this appeal was raised below by the motion of defendant's counsel for a verdict in his favor for want of evidence to show that the crane in use at the time of the accident was defective, or that the injury complained of was caused by any such defect or any negligence on the part of the defendant. The same question was raised by a proper motion after verdict.

The rule is elementary that, on appeal, a judgment cannot be reversed for want of evidence to support the verdict on which it is based, unless it clearly appears that there is no credible evidence which, in the most favorable view that can reasonably be taken of it, will support the verdict.

Within the range of reasonable probabilities, viewing the evidence from the standpoint of common sense and experience, the province of the jury to say where the truth lies as to the facts is exclusive, subject only to the discretionary control of the trial court when the finding is clearly against the preponderance of the evidence. When the reasonable probabilities are all one way, so clearly that different minds cannot reasonably differ about it, a jury has no more right to say the truth is otherwise, and have that stand as bind-

ing between parties, than the court has in a jury case to say what are the proper deductions of fact to be made from conflicting reasonable evidence or inferences therefrom.

By keeping the principles stated clearly in mind, not invading the legitimate province of the jury or allowing the jury to invade the province of the trial court, or such court to shift its legitimate responsibility onto the jury, our system of jurisprudence in legal actions will demonstrate perfection as near as human wisdom, up to the present time, has been able to attain in that field of civil government.

So it follows, as before indicated, that the judgment appealed from cannot be disturbed as contrary to the evidence, unless there is an entire absence of credible evidence to support some essential fact or facts in the case, and that reasonable minds cannot reasonably differ in that regard, keeping in mind, however, that the trial court, having better facilities for determining that question than this court, has determined it in the negative, and that such determination should prevail unless clearly wrong. *Maitland v. Gilbert P. Co.* 97 Wis. 476; *Powell v. Ashland I. & S. Co.* 98 Wis. 35; *Lewis v. Prien*, 98 Wis. 87; *Flaherty v. Harrison*, 98 Wis. 559; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Clifford v. M., St. P. & S. S. M. R. Co.* 105 Wis. 618.

The foregoing stated doctrine is particularly applicable to this case, because the character of the evidence is such that the trial judge and jury had superior facilities in a high degree, to what are possessed here, for understanding and weighing such evidence. The principal witness on the part of the plaintiff,— the one whose evidence, as it seems, appellant's counsel concedes, if credible, is fatal to his contention that the verdict of the jury is wholly without evidence to support it,— was a person of such limited knowledge of the English language that the placing of his ideas of the facts intelligently before the jury was attended with considerable difficulty. Then again, the trial court and jury

had the benefit of seeing a device of the kind used on the occasion of plaintiff's injury, of examining its working parts, and of having them carefully explained, and the particular location of the alleged defects in the crane that caused the mischief complained of, and the nature and probable effect of such condition, carefully pointed out by witnesses.

Applying what has been said to the evidence, from all the light we can glean from it, we are unable to come to a satisfactory conclusion that the trial judge was wrong in deciding that there was credible evidence which a jury had a right to believe, and upon it to base a finding in plaintiff's favor, as to the alleged defective condition of the crane, knowledge of it by the defendant, and that such condition was the sole proximate cause of the injury. It is useless to say how the evidence strikes us as we read it, as regards where the clear weight thereof is, for that is not before us. As to the question on which side the major probabilities are, where there are reasonable probabilities both ways, however much those on one side may appear here to overbalance the other, the judgment of the jury, approved by the trial court, must, as before indicated, stand as the infallible truth. For that reason, trial courts should exercise their power freely and firmly, to prevent injustice, when a jury goes plainly against the preponderance of the evidence.

No need appears to prolong this opinion by a careful and extended discussion of, and quotation from, evidence, to show the grounds of our conclusion that the verdict of the jury is not clearly against all reasonable probabilities. We may safely say that a person, looking at the evidence from the standpoint of a partisan, intensely interested for his client, and with that interest intensified by an honest conviction that injustice has been done, might reasonably conclude that the verdict of the jury is not only against the preponderance of the evidence, but contrary to every reasonable probability. That situation may, and probably does, often

happen, yet an unbiased judicial study of the evidence lead to a different conclusion. The line between reasonable probability and mere conjecture is not infrequently so indistinct that whether it be discovered or not depends upon the point of view from which the mental observation is taken.

The point urged here with greatest confidence by appellant's counsel, on the subject of the verdict being contrary to the evidence, is that there is no evidence whatever to identify the crane in use at the time of the accident with that previously reported to defendant as defective and unsafe; that the jury were permitted to find the fact in that regard by mere conjecture. The witness Much, who gave the only evidence on the subject, said there was no other crane on that track, speaking of the track the crane was worked on at the time of the accident. To the question, "Are you able to say that it was the same crane that you told the foreman about?" the witness said, "It was on the same track. Yes, sir. It was on the same track as was the other crane." The witness, however, said, that after he complained to the foreman about the defective crane he kept watch of it and knew where it was. True, the evidence is not entirely satisfactory as it reads in the record, but it is not beyond reason to say that the witness intended to be understood to testify that, from the time he observed the defective crane down to the time of the accident, it remained on the track where he first observed it, and was in use at the time of the accident. After some controversy as to whether the witness had identified the defective crane as the one in use at the time of the accident, this question was asked him: "I will ask you now whether the crane through which *Mr. Nicoud* got hurt was the same crane that you saw fall down several times within a day or so previous to the time that *Nicoud* got hurt?" to which he answered, "Yes. There was only one crane on that track." He further said, "I saw

it come apart and fall down two or three days before the accident. I saw the chain slip and let the load down five feet. I noticed the chain slip several times before the accident. Sometimes it slipped a foot and sometimes half a foot." There was considerable more evidence from the witness of like character, clearly given with reference to the crane in use at the time of the accident being the same as the one which was so defective as to render the chains liable to slip and drop the load suspended therefrom.

So it will be seen that, instead of there being no evidence that the defective crane of which the foreman had been notified was the one in use at the time of the accident, the jury had a right to regard the evidence of Much as very positive on the question. True, there was evidence of there being many cranes in the factory, and that they were liable to be changed about, but that only went to the credibility of Much's evidence, without rendering it contrary to all reasonable probabilities. There were many circumstances, and much evidence, bearing on the credibility of Much, but we are unable to say he was so impeached that the jury was bound to reject his evidence. There is less difficulty as regards the crane being in fact defective, and its causing the movement of the iron beam that inflicted the injury upon plaintiff, than in regard to the question above discussed, though it is true that the opposing evidence was very strong. We will not further pursue this branch of the case.

It is urged that the court improperly permitted hypothetical questions which assumed that there was evidence tending to prove that plaintiff was insensible shortly after the accident. We are unable to discover any difficulty in that regard. There seems to have been ample evidence to justify including that element in the question. Plaintiff testified that the blow upon his head made him kind of unconscious; that he was unconscious at least for a second or two; that he was taken to the engine room, but whether he was

carried or he walked he was unable to say; that he was taken from the engine room to the office, and there attended by a doctor; that he became dizzy while in the office, but came to on being brought out into the fresh air; that he found himself, after being in the office, in a carriage, and that the next thing he remembered was, he was at home in bed; that the night after the injury he was insensible all night. The mention of that evidence is a sufficient answer to the assignment of error in regard to the hypothetical questions.

Error is assigned because some leading questions were permitted. There is good ground for saying that the rights of defendant were violated in the conduct of the trial as regards matters of that kind, particularly with reference to the evidence of physicians while testifying as experts. The evidence of such witnesses is so liable to be biased and to promote injustice, that courts should confine questions put to them within the rules with considerable strictness. It is not improbable that the fact that violations of the rule against leading questions do not ordinarily constitute reversible errors, has too much influence toward a lax administration of it. It is proper to say that such tendency is one to be guarded against at all times, and particularly in regard to a class of witnesses who have come to be considered biased when testifying in a legal controversy, as much as parties or attorneys, and less entitled to credit because their testimony is confined to a field where pure conjecture and speculation can often run riot without any check except by witnesses of the same kind, because special study and experience is conclusively presumed to be necessary to enable a person to enter the field at all. These observations seem to be justified by a study of the leading questions allowed in this case. However, we are unable to say that defendant was prejudiced by them, therefore the errors in allowing the questions to be answered must be regarded as

harmless and not sufficient cause for reversing the judgment.

Exceptions were taken to instructions that assumed the existence of evidence tending to show that the crane in use at the time of the accident was the one testified to as having been reported to the defendant's foreman as defective, some time before. What has been said regarding evidence on that point sufficiently answers the assignment of error.

There are some other assignments of error, all of which have been considered without discovering anything that can properly work a reversal of the judgment. It is urged that the damages assessed are excessive. The range that a jury may take in assessing damages, where pain and suffering of a severe character, past and future, and other elements of loss, past and prospective, exist, to be compensated for in money, for which there is no definite standard of measurement, is so great that it is difficult to determine whether they have gone so far beyond reason as to evidence passion and prejudice, the only ground of reversal for excessive damages. *Goodno v. Oshkosh*, 28 Wis. 300; *Templeton v. Graves*, 59 Wis. 95; *Mechelke v. Bramer*, 59 Wis. 57. We cannot say the jury passed the bounds of reason in this case, though it is true that the damages appear to have been allowed with quite a liberal hand.

It was said, in substance, in *Templeton v. Graves*, *supra*, that the mere fact that damages are allowed very liberally will not warrant the court, on appeal, in reversing the judgment. Trial courts have a much greater supervisory control in that field than appellate courts. Upon them devolves the duty, exclusively, of preventing injustice by too large an assessment of damages, unless the amount clearly exceeds the bounds of reason in view of the evidence. We cannot say that in this case, as before remarked.

The plaintiff was forty-four years of age, capable of earning $30 per month at ordinary labor, and $75 per month at his trade. The injury permanently incapacitated him from

working at his trade, and permanently disabled him, in a considerable degree, from working at manual labor at all. The injury rendered him unable to do work requiring him to stoop over. In doing such work it was necessary for him to get down upon his knees. The bones of his face on one side were fractured, and the sensory nerve, furnishing sensation to that side of the face, was materially and permanently injured. His head was so injured as to affect his brain to some degree, permanently. There are many other matters bearing on the subject of damages, that might be mentioned, but enough has been said to show that the evidence tended to show at least that plaintiff was so severely and permanently injured that a considerable sum of money was required to adequately compensate him for his loss, and that the correct amount was very difficult of accurate determination.

The result of what has been said requires that the judgment appealed from be affirmed.

By the Court.— So ordered.

SERFLING, Respondent, vs. ANDREWS, Appellant.

106 78
53 LRA 36n
53 LRA 99n

February 6 — February 27, 1900.

Damages: Breach of contract: Failure of lessor to give possession.

1. Damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties, at the time of the making of such contract, as the probable result of a breach of it.
2. Unless it is shown that the special circumstances were brought to the knowledge of the lessor at the time of the leasing of a dwelling house, damages for his failure to give the lessee possession of the premises cannot include loss of prospective profits of a business which the lessee was prevented by such failure from entering upon in the place where such house was located, nor the freight paid by him for moving his household goods to such place.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The complaint sets out that the plaintiff was a cheese maker; that as such he hired out to one Holzschuh for the season of 1898; that he leased a certain dwelling house from the defendant for one year; that he removed his household effects from Sheboygan to Sherwood, in Calumet county, but the defendant refused to give him possession of the rented premises; that he was unable to secure another house, and was compelled to cancel his contract of hiring and remove elsewhere; and that he suffered damage in the sum of $190.

The answer admits that there was talk about the leasing of the house, but alleges that it was conditional upon the defendant's being able to secure possession from the tenant then in possession, and denies the other allegations of the complaint.

On the trial the plaintiff was permitted to prove a partnership with Holzschuh by which they were to operate the cheese factory for the season of 1898, and that, by reason of his inability to secure the house in question, he had to relinquish the business. Considerable testimony was given, against defendant's objection, as to the profits of the business; and the court instructed the jury that the plaintiff was entitled to recover $1 that had been paid on the lease, $11.41 freight on his household goods from Sheboygan to Sherwood, $6 freight on his goods to Appleton, and for the profits of the cheese factory, less what he earned elsewhere. The jury brought in a verdict for plaintiff for $212.90. Plaintiff's counsel remitted therefrom $22.90, and judgment was entered for plaintiff for $190 and costs. A motion for a new trial was denied, and the defendant has appealed.

The cause was submitted for the appellant on the brief of *James Kerwin*, attorney, and *L. J. Nash*, of counsel, and for the respondent on that of *J. E. McMullen*.

BARDEEN, J. The court seems to have proceeded upon an entirely erroneous idea as to the rule of damages applicable to this case. The complaint merely sets out the making of the lease, the plaintiff's business, a hiring out to Holzschuh for the season of 1898, a removal from Sheboygan to Calumet county, a failure of defendant to deliver possession of the leased premises, his inability to secure another house, a consequent cancellation of his contract of hiring, and a general allegation of damage. It is not alleged that defendant ever had any knowledge of plaintiff's business or of the contract of hiring. The proof shows, without dispute, that plaintiff and Holzschuh were to be partners in the operation of the cheese factory. Holzschuh was to furnish the factory and look after securing the milk. Plaintiff was to do the work in the factory, and the profits and losses were to be shared equally. The usual test of a partnership is whether there is a community of interest in the profits and losses of the business. Any arrangement which gives the parties such a community of interest constitutes them partners. *Whitney v. Ludington*, 17 Wis. 140; *Sprout v. Crowley*, 30 Wis. 187; *Rosenfield v. Haight*, 53 Wis. 260; *Wipperman v. Stacy*, 80 Wis. 345; *Spaulding v. Stubbings*, 86 Wis. 255. The court permitted proof of this relation to be introduced without any allegation of the fact in the complaint, and also permitted a recovery for prospective profits of the business, without any allegation of special damage or showing that the defendant had any knowledge of this relation. Damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties, at the time of the making of such contract, as the probable result of a breach of it. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214; *Bradley v. C., M. & St. P. R. Co.* 94 Wis. 44. Upon the facts stated in the complaint, the true rule of damages would have been the difference between the actual rental value of the premises for the

term and the rent reserved in the lease. 3 Sedgwick, Dam. § 1022, and cases cited; *Poposkey v. Munkwitz*, 68 Wis. 322; *Pewaukee M. Co. v. Howitt*, 86 Wis. 270. If plaintiff desired to recover special damages, such as loss of prospective profits, it was his duty to allege the facts and circumstances, and knowledge of the situation brought home to the defendant at the time the lease was made. Without such knowledge, it cannot be said that loss of profits, or other losses than such as are included in the rule of damages stated, could have been within the contemplation of the parties when the lease was entered into. The court not only permitted proof of loss of profits in the cheese-making business to be given, but also testimony as to freight paid in moving plaintiff's household goods,—all against defendant's objection. He also instructed the jury that, if they found the lease had been made, allowances for these items should be included in their verdict. There being no proof of the value of the leasehold during the term, the jury's verdict must have been based entirely upon these objectionable items. Such being the fact, there was no proper foundation for the verdict to rest upon. In the *Guetzkow Case* it was said "that, in order to make applicable the special rule of damages — that is, loss of profits — it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home." No such knowledge was given defendant. Hence the recovery in this case cannot be sustained.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SHEPARD and others, Appellants, vs. OSTERTAG, Garnishee, Respondent.

February 6 — February 27, 1900.

Debtor and creditor: Fraudulent conveyance.

A finding that a chattel mortgage and an assignment of book accounts to the mortgagor's father, and the disposal of the property by the latter, were all in good faith to pay a debt, and not to hinder, delay, or defraud the creditors of the mortgagor, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *C. D. Cleveland, Jr.*, attorney, and *Thompson, Harshaw & Thompson*, of counsel, and oral argument by *Mr. J. C. Thompson* and *Mr. Cleveland.*

For the respondent there was a brief by *Bouck & Hilton*, and oral argument by *Geo. Hilton.*

DODGE, J. The defendant, being indebted to his father, the garnishee, in about the sum of $3,100, and to other creditors in approximately a like sum, of which other indebtedness $600 was upon notes indorsed by the garnishee, executed to the latter a chattel mortgage upon his entire stock of hardware merchandise, and assigned to him the outstanding book accounts, to secure such indebtedness, including the indorsement liability. The mortgage was recorded on the following day, and the garnishee went into immediate possession, and proceeded to dispose of the property at retail, but did not realize the amount of his claim. Plaintiff, a creditor of the defendant, garnished before the property was all sold. The court found the debt to be *bona fide*, and "that the giving of said mortgage, and the assignment of said book accounts, and such disposal of said property by

the garnishee, was in good faith to pay a debt, and not to hinder, delay, or defraud the creditors of said defendant." Judgment was entered in favor of the garnishee, from which the plaintiffs appeal.

Upon careful examination of the evidence, we are satisfied that no clear preponderance opposes the finding above set forth. Judgment dismissing the proceedings necessarily results therefrom. *Stevens v. Breen*, 75 Wis. 595; *H. B. Claflin Co. v. Grashorn*, 99 Wis. 356.

By the Court.— Judgment affirmed.

OSHKOSH WATER WORKS COMPANY, Appellant, vs. CITY OF OSHKOSH, Respondent.

February 6 — February 27, 1900.

Municipal corporations: Appeal from disallowance of claim: Waiver of defects in bond: When claim is "presented."

1. If the bond given on an appeal to the circuit court from a common council fails to comply with the requirements of the city charter, the city officers cannot by approving the bond waive the objection and confer jurisdiction of the subject matter upon the court.
2. The filing of a claim with the city clerk, not its actual introduction into the common council, is its "presentation" to the council for allowance, within the meaning of the provision of the Oshkosh city charter (Laws of 1891, ch. 59, subch. XXI, sec. 4), that failure of the council to pass upon such claim within sixty days after its presentation shall be deemed a disallowance thereof.

APPEAL from an order of the circuit court for Winnebago county: MICHAEL KIRWAN, Judge. *Affirmed.*

This is an action to recover for the rental of fire hydrants. The record shows that the plaintiff on the 24th day of September, 1898, filed with the city clerk of the city of *Oshkosh* a verified bill claiming the sum of $5,145 for hydrant

rental for the quarter ending October 1, 1898. On the 30th of September the city comptroller recommended the allowance of the bill at $1,911.50. Thereafter the finance committee of the common council of the city of *Oshkosh* recommended the allowance of the bill at the sum of $4,630.50. The bill was presented to the common council November 10, 1898, and on the same date allowed by the common council at $4,630.50. It was presented to the mayor for approval November 16, 1898, and vetoed by the mayor November 17, 1898, which veto was sustained by the council November 27, 1898, ten members of the council voting to allow the claim notwithstanding the veto, and nine members voting in the negative; the charter of the city requiring a two-thirds vote in order to overrule the veto.

On the 12th of December, 1898, the plaintiff served a notice of appeal and a bond upon the city clerk, the bond being conditioned that the plaintiff would faithfully prosecute its appeal and pay all the costs that should be adjudged against it in the circuit court for Winnebago county, Wisconsin. This bond was approved by the city attorney and the city comptroller of the defendant city. On the 13th of January, 1899, another notice of appeal and bond was served upon the city clerk, the bond being correct in form, and it was approved by the city attorney and comptroller as to the sufficiency of the sureties on the 17th day of January, 1899, without, however, waiving any objection to the right of the plaintiff to give or file such bond.

The defendant moved to dismiss the appeal for lack of jurisdiction, because the appeal was not taken in the manner provided by law, and because the required bond had not been given. Upon this motion the appeal was dismissed, and from the order of dismissal the plaintiff appeals.

For the appellant there was a brief by *Hooper & Hooper*, and oral argument by *Moses Hooper*.

John F. Kluwin, city attorney, for the respondent.

WINSLOW, J. The charter of the city of *Oshkosh* (ch. 59, Laws of 1891) provides: "No action shall be maintained by any person against the city upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed to be a disallowance thereof." Sec. 4, subch. XXI. "The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided." Sec. 5. "No claim shall be considered by the council or reported to a committee till it shall have been examined and reported on by the comptroller." Sec. 1, subch. IX. Another section (sec. 6, subch. XXI) provides for an appeal to the circuit court by written notice served upon the city clerk within twenty days after the disallowance, and by the execution of a bond to the city in the sum of $150, "with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant in the circuit court."

The question presented by the record is whether the circuit court acquired jurisdiction by either of the attempted appeals.

The first appeal was confessedly taken within the prescribed time, but the bond given was confessedly bad under the rule laid down in *Drinkwine v. Eau Claire*, 83 Wis. 428, and for precisely the same reason given in that case. It is claimed, however, that there has been a waiver of the objection by the action of the city attorney and comptroller in approving the bond. This claim cannot be sustained. The

question is one of jurisdiction of the subject matter, and not merely of the person. Only by substantial compliance with the requirements of the statute can the circuit court obtain jurisdiction of the subject matter. *Drinkwine v. Eau Claire, supra; Telford v. Ashland*, 100 Wis. 238. The parties cannot confer jurisdiction of the subject matter upon the court by express agreement, much less by waiver.

The second attempted appeal papers were, however, sufficient in form, and were effectual if served in time. The action of the common council in refusing to pass the claim over the mayor's veto was taken November 22, 1898, and, if this be considered a "decision" disallowing the claim, then the second appeal was not taken within twenty days thereafter, and hence was not taken in time. If, however, as is argued, the sustaining of the veto by a minority vote was not action by the council, but simply constituted a failure to pass upon the claim, then the question arises as to when the claim was presented to the council within the meaning of sec. 4, subch. XXI. If it was presented when filed with the city clerk (September 24, 1898), then the sixty-day period of nonaction which is deemed a disallowance expired November 23d, and the twenty-day period for appeal expired December 13th, and the appeal is too late. If, however, the actual introduction of the claim into the council (November 10th) be considered its presentation, then the sixty-day period did not expire until January 9, 1899, and the appeal was taken in time. Following the rule laid down in *Bacon v. Antigo*, 103 Wis. 10, where a similar charter provision was involved, we must hold that the filing of the claim with the clerk was the presentation thereof to the council, and hence that the second attempted appeal, in any view of the facts, was too late.

By the Court.— Order affirmed.

WHITTY, Respondent, vs. CITY OF OSHKOSH, Appellant.

106 87
110 [1]487
106 87
61 LRA 589n

February 6 — February 27, 1900.

Municipal corporations: Injury from open hatchway in sidewalk: Negligence of lot-owner: Pleading: Contributory negligence.

1. Although a lot-owner may construct and maintain a hatchway in the sidewalk, covering the opening when not in use so that it will not affect the safety of the walk, and when in use guarding it reasonably to prevent travelers in the exercise of ordinary care from stepping into it, yet if the city knowingly, or with reasonable means of knowledge, permits such opening to be negligently used, it is liable for injuries caused by such use.
2. A complaint will not be held bad on demurrer, on the ground that it discloses contributory negligence, unless the facts leave no reasonable doubt on the question.
3. In an action for injuries sustained by falling into an open hatchway in a sidewalk, a complaint stating that plaintiff, in approaching the hatchway, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it, and that she was free from negligence, is *held* not to show conclusively contributory negligence on plaintiff's part.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover compensation for personal injuries.

In the defendant city, near where two much-used sidewalks met at an obtuse angle, an abutting lot-owner maintained in the walk a hatchway over an excavation about nine feet deep, for convenience in conveying merchandise to and from the basement of his building. The hatchway was seven feet long by four feet wide, occupying, when open, the width of the walk except twenty inches on the outer edge. When not in use the hatchway was covered by two hinged doors, and was opened by turning the doors back on the walk. With knowledge of the officers of the defendant city, for three years before the accident it had been the custom of the occupant of the abutting lot to frequently, and

as often as he desired, open the hatchway without providing any guards whatever or means of warning to prevent persons using the walk from falling through the opening. That was the condition on the occasion in question. In that situation plaintiff approached the opening in the exercise of ordinary care, stepped into it, fell to the bottom of the excavation, and thereby received painful and serious injuries.

All these facts were stated in the complaint, together with allegations showing performance by plaintiff of the conditions precedent to the commencement of the action. In regard to the manner of using the hatchway, and notice thereof to the city, the following language was used in the complaint: "Said hatchway and doors were constructed with no guards or barriers of any kind or description to give warning or prevent people from stepping into the opening when said doors were open. Said hatchway existed in said sidewalk for a period of more than three years prior to the happening of said accident, during all of which time the owner and lessee of said building had been accustomed to open said hatchway frequently, leaving an open, unguarded, and unprotected space in the sidewalk, and making a dangerous hole and opening into the cellar below. The said defendant city, its officers, board of public works, and aldermen, at the time of said injury, and a long time prior thereto, well knew of the insufficiency and dangerous condition and want of repair of said sidewalk, at the point where said injury occurred, and carelessly, negligently, and knowingly suffered and permitted the same to remain in such dangerous condition."

The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appealed.

John F. Kluwin, city attorney, for the appellant.

For the respondent there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *C. D. Jackson*. They cited

Smalley v. Appleton, 70 Wis. 340; *Everman v. Menomonie*, 81 Wis. 624; *McClure v. Sparta*, 84 Wis. 269; *Day v. Mt. Pleasant*, 70 Iowa, 193; *Bacon v. Boston*, 3 Cush. 180; *Pawtucket v. Bray*, 2 Am. Neg. Rep. 71.

MARSHALL, J. It is argued at some length, and the argument supported by authority, that a lot-owner in a city may use the space under the sidewalk in front of his lot, constructing and maintaining, for his convenience, coal holes and hatchways in such walk, covering them when not in actual use so they will not affect the safety of the walk for public travel, and when in use guarding them reasonably, to prevent persons, traveling on the walk in the exercise of ordinary care, from stepping or falling into them. Such is the law. It has been often so declared by this and other courts. *Papworth v. Milwaukee*, 64 Wis. 389; *Smalley v. Appleton*, 75 Wis. 18; *McClure v. Sparta*, 84 Wis. 269; *Cooper v. Milwaukee*, 97 Wis. 458; *Severin v. Eddy*, 52 Ill. 189; *Peoria v. Simpson*, 110 Ill. 294. That doctrine, however, does not shield a municipality from the consequences of knowingly permitting such an opening to be used in a negligent manner.

Every city and village in this state is in duty bound by statute, in constructing, or allowing to be constructed, a sidewalk for public use, to see that it is made reasonably safe therefor, and to use all reasonable precautions thereafter to maintain it in that condition. Permission by a city to use the space under a sidewalk, with an opening thereto in the walk, and the proper use thereof, does not violate any duty owing to the public by such city. If the opening be negligently used, the proper officers of the city having sufficient notice to enable them, by the exercise of reasonable diligence, to remedy the mischief, its duty to the public is thereby violated. That was distinctly held in *Cooper v. Milwaukee, supra.* The idea is that both the occupant of a lot

to which a hatchway is appurtenant, and the public corporation, are responsible for negligence in regard to the safety of the walk. Both owe a duty to the public to keep the walk in a reasonably safe condition for travel. That of the corporation, however, is not breached, as to the circumstance of an improperly used hatchway, till its officers knowingly, or with reasonable means of knowledge, are guilty of permitting such use.

The significant fact alleged here is that the city, knowingly, for a period of three years, permitted the frequent and customary use of the hatchway in an entirely unguarded condition. That makes a plain case of breach of duty as indicated.

In *McClure v. Sparta*, *supra*, as reported, the necessity of notice to the city of the existence of an open hatchway, or of the hatchway being used in a negligent manner, so as to render the walk unsafe, does not appear to have been recognized. It is certainly the law, as laid down in *Cooper v. Milwaukee*, *supra*, and in this case, that the mere fact that a hatchway, lawfully located in a sidewalk and properly covered, is opened and negligently left unguarded, does not render the city liable for the consequences. No such duty rests on a city that it must so police all the public walks therein as to guard the coal holes and hatchways in such walks at all times and thereby prevent the negligent use of such openings. When it is said that a hatchway may lawfully be placed in a sidewalk for the convenience of the owner of the property fronting thereon, or the occupant of such property, such hatchway being properly covered when not in use, it necessarily follows that the municipality, charged with the duty of exercising reasonable care to maintain the walk in a reasonably safe condition for public travel, cannot be held liable for a breach of duty merely because some person may negligently leave the hatchway open. The officers of a public corporation, charged with the perform-

ance of its duties as regards the condition of its streets and walks, have a right to assume that no one will render a walk unsafe by his manner of using it, until notified to the contrary.

It is further urged that the complaint discloses contributory negligence, and for that reason is fatally defective. Contributory negligence is matter of defense. It need not ordinarily be negatived in the complaint, or by plaintiff as a part of his proof in chief on the trial. *Randall v. N. W. Tel. Co.* 54 Wis. 147; *Hoth v. Peters*, 55 Wis. 405; *Rhyner v. Menasha*, 97 Wis. 523. The presumption of fact is that every person conducts himself with ordinary care. So it follows that in the trial of a personal injury action, if the plaintiff can make out a cause of action without disclosing contributory negligence conclusively, the question in that regard is for the jury. *Prideaux v. Mineral Point*, 43 Wis. 524; *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 583; *Gower v. C., M. & St. P. R. Co.* 45 Wis. 182; *Delancy v. M. & St. P. R. Co.* 33 Wis. 72; *Hoyt v. Hudson*, 41 Wis. 105. The rule is the same in regard to the complaint. *Hoth v. Peters, supra.* That is, unless the facts alleged disclose contributory negligence, so as to leave no reasonable doubt on the question, the presumption of the exercise of ordinary care, for the purposes of the complaint, will prevail. That necessarily follows from the rule that, on demurrer to a complaint, every reasonable intendment and presumption must be given effect in support of it. *Morse v. Gilman*, 16 Wis. 504; *Miller v. Bayer*, 94 Wis. 123; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230; *Kliefoth v. N. W. I. Co.* 98 Wis. 496; *Martens v. O'Connor*, 101 Wis. 18.

Applying the foregoing to the facts stated in the complaint, it cannot be said that they conclusively show failure of plaintiff to exercise ordinary care, contributing to her injury. We start with the presumption to the contrary; then there are the pleaded facts that plaintiff, in approaching the

hatchway, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it, and that she was free from negligence. It is by no means certain but that, without any allegation in the complaint that plaintiff was free from contributory negligence, it would state a good cause of action. We are not called upon to go that far. The complaint expressly alleges freedom from contributory negligence.

By the Court.— The order of the circuit court is affirmed.

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MORRIS, Respondent, vs. NATIONAL PROTECTIVE SOCIETY OF BAY CITY, MICHIGAN, Appellant.

February 6 — February 27, 1900.

(1) *Appeal: Exceptions: Review of orders.* (2) *Accident insurance: Breach of warranty: Waiver: Evidence.*

1. Under sec. 3070, Stats. 1898, if an order refusing to set aside a verdict and grant a new trial is made a part of the record by the bill of exceptions, the supreme court, on appeal from the judgment, may pass upon the sufficiency of the evidence to sustain the verdict, although no exception was taken to said order.
2. In an action upon an accident policy, the question being whether there had been a waiver of the defense of breach of a warranty in the application that the applicant then had no other similar insurance, a letter written by the insurer from which its knowledge of other insurance *at the time of the accident* might be inferred is not evidence of its knowledge that there was other insurance at the time of the application.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Reversed.*

This is an action against a mutual benefit association upon an accident indemnity policy of insurance. The defense insisted upon was that there was a breach of a warranty

contained in the application for the policy. The evidence showed that the policy was issued September 14, 1897, and provided for the payment of benefits for total disability for labor, arising from injuries received by accident, in the sum of $10 per week, not exceeding fifty-two weeks in all. The application for the policy, and upon which it was issued, contained, among other warranties, a warranty that the insured then had no other sick or accident benefit insurance. The policy was issued in consideration of the payment of a membership fee of five dollars, and a monthly premium of one dollar, payable on the 1st day of each month, in advance. The plaintiff paid the membership fee and the premium falling due October 1st, but it was admitted that the plaintiff, at the time of his application and the issuance of the policy, had other accident indemnity insurance in force. Upon the 8th of October, 1897, the plaintiff received an accidental fall, and was seriously injured and incapacitated for labor until the 12th or 14th of January, 1898. On the 9th of October, 1897, the plaintiff caused to be sent to the defendant a notice of his injury, and stated therein that he was insured in no other accident company, which notice was received by the defendant within a few days after it was sent.

On the 5th day of January, 1898, the plaintiff, through his attorneys, sent a letter to the defendant, giving a statement of his injuries, and asking for blanks whereon to make proofs. To this letter the defendant replied, January 7, 1898, as follows: "Yours of the 5th, in reference to the claim of *H. Johnson*, received. We received notice of *Mr. Johnson's* injury in the fore part of October. He allowed his policy to lapse on November 1st, for nonpayment of dues, and we subsequently had the claim investigated, and found that he was not totally disabled, so we do not think he is entitled to any indemnity. We also sent our agent a blank for proof, so we could more fully ascertain the cause of injury and if he was really totally disabled, but our agent did not have same

filled out. J. D. Paddock, of the Mutual La Crosse Society, of Wisconsin, also went to Oshkosh to investigate this claim, and wrote us that he did not think that man was totally disabled, and therefore he was not entitled to benefits. It is quite evident that his injury did not produce the sickness that you claim he is suffering from. You state that he has been confined to his bed for eleven weeks. You were certainly misinformed in regard to this, as he has not been anything of the kind. We shall, however, look into the matter further, before we will say whether we shall pay his claim or not."

On the 15th of the same month the plaintiff caused to be forwarded final proofs, for the making of which he paid his attorneys the sum of five dollars. To this the defendant replied by letter as follows, on the 17th day of January, 1898: "Yours inclosing what you term final proofs for injury to *Henry R. Morris*, sometimes called *Henry Johnson*, received. We see that you make claim for injury after his policy lapsed. His policy lapsed November 1st for nonpayment of dues; so, if he is entitled to claim at all, it would only be up to November 1st. We have been in communication with the secretary of the La Crosse Mutual Aid Association, and he writes us that he will be in Oshkosh in a few days, and will investigate the claim, and advise us what he intends to do. We are sure that if he finds *Mr. Morris*, or *Johnson*, entitled to indemnity, that he will pay same, and if he does we shall also pay him his claim up to the time his policy was in force. We, of course, cannot allow him any indemnity after November 1st. Will advise you more in regard to this as soon as we hear from Mr. Paddock."

The claim not being paid, this action was commenced. At the close of the evidence the defendant moved that a verdict be directed in its favor, and the plaintiff moved for the direction of a verdict in his favor. The court directed

a verdict for the plaintiff, with damages fixed at the sum of $144.70. No exception was taken to this ruling. After the verdict was rendered, the defendant moved to set the same aside and for a new trial, but the court entered judgment on the verdict for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Kerwin, Phillips, Hicks & Cleveland*, and oral argument by *C. D. Cleveland, Jr.*

For the respondent there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *C. D. Jackson.*

WINSLOW, J. A verdict for the plaintiff was directed, notwithstanding the admitted breach of warranty as to existing insurance of a similar character, because the court held that the defendant had waived its right to rely on this defense. Prior to the consideration of the question of the correctness of this ruling, however, a preliminary objection must be considered. It is claimed by the respondent that there is no exception in the record which enables this court to review the evidence. It is true that no exception was taken to the denial of the motion to direct a verdict for defendant, but a motion was made to set aside the verdict and for a new trial, which was overruled; and it has been distinctly held that, where it appears by the record that such a motion has been denied, this court may, on appeal from the judgment and without exception to the order, examine the record to see whether there was any evidence to support the verdict, and if there was none, or if there was a clear preponderance the other way, may reverse the judgment on that ground. *Tourville v. Nemadji B. Co.* 70 Wis. 81. See, also, *Webster v. Phœnix Ins. Co.* 36 Wis. 67. This ruling was made because the order (when made part of the record by the bill of exceptions) is one of the orders covered by sec. 3070, Stats. 1898, and, by the express terms of that section, may, without any exception thereto, be reviewed upon appeal from the judgment.

Coming, then, to the main question, we are compelled to say that there was no evidence in the case showing waiver of the defense of breach of warranty. It does not appear by any evidence in the case that the defendant company, at any time prior to the commencement of the action, had any knowledge that the plaintiff had other insurance at the time he made his application. It is true that it may perhaps be inferred from its letter of January 7, 1898, that it was then informed of other insurance in the Mutual La Crosse Company *at the time of the plaintiff's injury*, but this fact would constitute no defense; nor can it be inferred that the plaintiff had other insurance in September because the fact appears that he had such insurance in the following month.

There being no evidence to show that the defendant had any knowledge of the breach of warranty when the letter of January 7th was written, it is clear that the letter constitutes neither waiver nor estoppel, because it does not appear that it was written with knowledge of the material facts. *Rasmusen v. N. Y. L. Ins. Co.* 91 Wis. 81.

By the Court.— Judgment reversed, and action remanded for a new trial.

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KRUEGER and another, Appellants, vs. WISCONSIN TELEPHONE COMPANY, Respondent.

February 7 — February 27, 1900.

Highways: Rights of abutting owners: Telephone companies: Right to construct lines: Statute construed: Additional servitude: Continuing trespass: Abatement of nuisance.

1. Subject only to the public easement, the owner of land abutting on a street owns the fee to the center of the street, and neither the legislature nor municipal authorities can authorize the taking or incumbering of the street for purposes inconsistent with its public use without the consent of the owner, unless some provision for compensation has been made.

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2. Sec. 1778, Stats. 1898, giving to telegraph companies (including telephone companies) the right to construct and maintain their lines upon and along highways, grants no power to use the highway except as against the public, and was not intended to cut off or limit the rights of the actual owners of the land affected thereby.
3. The compensation paid to the owners of land over which highways have been laid out since the enactment of the above-mentioned statute in 1848 (Terr. Laws of 1848, p. 257) did not cover the use to which such highways might be put by telegraph and telephone companies, their occupancy of portions of the highway being a permanent occupancy of the land, independent of the public use, for the direct benefit of private corporations, and not one which can fairly be said to have been within the contemplation of the parties. *Huston v. Fort Atkinson*, 56 Wis. 350, distinguished.
4. The occupancy of a portion of a highway by the poles and other structures of a telephone line constitutes an additional servitude, as against the owner of the land, which cannot be imposed without his consent, nor without compensation if he requires it.
5. The erection and maintenance of a telephone pole in the street in front of the show window of a store building, interfering with the proper use and enjoyment of the property, is a continuing trespass upon the land, and a nuisance which a court of equity will abate.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The defendant is a corporation owning and operating a system of telephones and telephone exchanges in this state. In 1882 the city of Neenah, by ordinance, granted the defendant the right to erect and maintain a telephone system in said city. By it the company was granted the right of way through and upon the "streets, sidewalks, alleys and public grounds of the city, for the use of poles and the necessary wires, provided the same were set in such manner as not to interfere with public travel or the flow of water in the gutters, the point of location to be determined under the direction of the street commissioner or city engineer." The system was erected and continued in operation until April, 1895. As originally located, there was a pole about twelve feet north of the corner of Cedar and Wisconsin

streets. An increase of business necessitated a reconstruction of the system. In the progress of the work it was deemed desirable to change the location of some of the poles, and in making such changes this controversy arose.

The complaint sets out that the plaintiffs are the owners of a tract of land having a frontage of twenty feet on Wisconsin avenue and seventy-seven feet on Cedar street, exclusive of streets. Upon this tract was located a large store building, occupied as a drug store, in the corner of which were large glass windows and doors, looking out upon both streets. In April, 1895, the defendant, without the consent and against the protests of the plaintiffs, set a large pole at the street corner, a few feet from the corner of the drug store, and immediately in front of the show windows, which, it is alleged, materially incumbers said property and obstructs the view from said store; that it was so set without authority from the city, and against the protest of the mayor and street commissioner; that such pole and the wires thereon are a nuisance, and greatly interfere with the proper use and enjoyment of plaintiffs' property; that defendant insists upon the right to occupy and hold possession of said premises adversely to plaintiffs, and against their will, and without making any compensation therefor. The relief demanded is for damages, a removal of the pole, and a restraining order against its future maintenance.

The answer sets up the incorporation of defendant, its business, the payment of license fees as required by law, the building of telephone systems throughout the state, the erection of the exchange at Neenah in 1882, the erection of the pole twelve feet north of the intersection of said streets, the width of the street, acquiescence by plaintiffs in the location of said pole, the reconstruction of the system in 1895, the erection of the pole in dispute at the point designated by the street commissioner, its necessity at that place for the proper management of its exchange, its existence at that

point since May, 1895, and a denial that the pole or wires interfere with the means of ingress or egress from said premises or obstruct or hinder the uses thereof.

When the case was called for trial the defendant asked the court to require the plaintiffs to elect whether they relied upon a legal or equitable cause of action. The request was denied, and a jury was duly impaneled. A special verdict was returned, substantially as follows: (1) That the pole, as at present located, was not an obstruction to the ordinary use of the street. (2) That the cables and wires attached to the pole interfered with the plaintiffs' use and enjoyment of their property. (3) That the pole was a damage to plaintiff's property. (4) That the pole decreased the rental value of such property. (5) That up to the commencement of this action the plaintiffs' damage was seven dollars. (6) That the street commissioner did not consent to the placing of the pole where it now stands. (7) That the pole could have been placed at some other point without great inconvenience to defendant. (8) That the plaintiffs did not refuse to permit the placing of the pole on the west side of Cedar street, seven feet north of the lot line of Wisconsin avenue. (9) That plaintiffs objected to the placing of the pole where it was put. (10) That the erection of the pole at some other point was practicable. (11) That the erection of the pole at any other point would not have been according to the most approved plan of telephone construction — "not for Telephone Co." (12) That the pole could not have been erected on Cedar street, seven feet north of the south line of plaintiffs' building, and connected with the line running west on Wisconsin avenue, without carrying the wires over plaintiffs' building.

The plaintiffs moved to amend the special verdict by striking out the negative answers to the first, eleventh, and twelfth questions, and substituting an affirmative answer, which was denied. A motion for judgment for plaintiffs

on the verdict as rendered was also denied. The court took the matter under consideration, and, in a written opinion, decided that the action was equitable and the verdict only advisory; that the pole in question was not a nuisance; that the placing of such poles in a street was not an additional burden upon the land which entitled adjoining owners to compensation; and that, although they might occasion some damage to abutting lot owners, it was *damnum absque injuria.* Judgment dismissing the complaint, with costs, was entered, from which plaintiffs have taken this appeal.

J. C. Kerwin, for the appellants, to the point that the placing of telephone poles in a street is an additional servitude, cited, besides cases cited in the opinion, Keasbey, Electric Wires (1st ed.), 71, 72, 77, 80–82; 2 Cook, Stock (3d ed.), § 931; 25 Am. & Eng. Ency. of Law, 753; Mills, Eminent Domain, § 35; Cooley, Const. Lim. (6th ed.), 687, 689; *Dusenbury v. Mut. Tel. Co.* 11 Abb. N. C. 440; *Metropolitan T. & T. Co. v. Colwell L. Co.* 18 Jones & S. 488; *Tiffany & Co. v. U. S. I. Co.* 19 Jones & S. 280; *Dailey v. State,* 24 L. R. A. 724; *Lawrence R. Co. v. Williams,* 35 Ohio St. 168; *Prentiss v. Cleveland Tel. Co.* 32 Weekly Law Bull. 13; *H. Clawson & Sons B. Co. v. B. & O. Tel. Co.* 17 Chicago Legal News, 22; *Am. T. & T. Co. v. Jones,* 78 Ill. App. 372; *W. U. Tel. Co. v. Ann Arbor R. Co.* 90 Fed. Rep. 379; *St. Louis v. W. U. Tel. Co.* 148 U. S. 92; *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 597.

For the respondent there was a brief by *Miller, Noyes, Miller & Wahl,* and oral argument by *Geo. P. Miller.* They contended, *inter alia,* that the Massachusetts doctrine of the uses to which a street can properly be put without the abutter being entitled to additional compensation (*Pierce v. Drew,* 136 Mass. 80; *Lincoln v. Comm.* 164 Mass. 9) has been adopted by this court and by the weight of authority in other states. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194; *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 568; *Huston v.*

Ft. Atkinson, 56 Wis. 350; Booth, Street Railway Law, §§ 82, 83, and authorities cited. To the point that a telephone or telegraph pole is not an additional burden, they cited, besides cases cited in the opinion, *Hewett v. W. U. Tel. Co.* 4 Mackay, 424; *Rugg v. Comm. U. Tel. Co.* 66 Vt. 208; *Gay v. Mut. U. Tel. Co.* 12 Mo. App. 485; *York Tel. Co. v. Keesey*, 5 Pa. Dist. 366; Mills, Eminent Domain (2d ed.), § 187; *Bradley v. Southern N. E. Tel. Co.* 66 Conn. 559; Keasbey, Electric Wires (1st ed.), 82–85.

BARDEEN, J. The importance of this litigation is manifest. It involves the vexed question of whether the placing of telephone poles in a street is an additional servitude, as against the abutting owner, not contemplated by the dedication, that cannot be imposed without his consent, nor without compensation if he requires it. This precise question has not heretofore been decided by this court, so we are free to deal with it as one of first impression, except in so far as the policy of the state has been declared in decisions where kindred questions have been considered and determined. That the question should not have been presented before, in view of its importance and the number and character of the telephone exchanges in the state, is, perhaps, a matter of some surprise. Its importance lies not so much in the individual interests at stake, as in its effect upon the interests of corporations, that have built so many miles of poles, and operated so many exchanges, within the borders of the state. In whatever light it may be viewed, it is not entirely free from difficulty. The question has arisen in many of the states, and adjudications upon both sides are numerous and not without helpful value. The best legal thought of the country has been given to its consideration, and there is little that has been left unsaid. Both sides of the controversy have been presented by eminent counsel, and considered by learned and able judges; and the result has been,

as before stated, a considerable diversity of opinion. Kindred questions have heretofore arisen in this state, and while, perhaps, the decisions have not been in complete harmony with the basic idea of street dedication, it is not believed there has been any radical departure therefrom.

The fundamental idea of street dedication is that the land so dedicated is to be set apart to the entire public for such public use and purpose as the location of the street, urban or suburban, seems to require. The primary use and purpose is public travel. The servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be open and free for public use as a highway. There is, however, an essential and well-recognized difference between urban and suburban servitudes. The easement of the one is much more comprehensive than the other. Many of the rules which apply to the one class of easements are wholly without force as against the other class. Elliott, Roads & S. 299. This distinction is here referred to in view of the contention made by defendant's counsel hereinafter to be noticed.

We may further premise our discussion with the statement that it is the settled law of this state that the owner of land abutting on a street owns the fee to the center of the street, subject only to the public easement. The doctrine was first announced in *Gardiner v. Tisdale*, 2 Wis. 153, and has been followed in a line of decisions since almost as numerous as the published volumes of reports. This being so, this court held in *Ford v. C. & N. W R. Co.* 14 Wis. 609, that the railroad company could not appropriate and occupy a street with its track without consent of the proprietors of the lots bounded by the street, or compensation made to them, and neither the legislature nor the municipal authorities have any power to dispense with the making of such compensation. See *Blesch v. C. & N. W. R. Co.* 48 Wis. 168;

Buchner v. C., M. & N. W. R. Co. 60 Wis. 264; *Hegar v. C. & N. W. R. Co.* 26 Wis. 624. The reason given for this conclusion as stated in the *Ford Case* is that "the two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." In *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, the question was raised whether the construction and operation of a horse railway in the streets of a city imposed a new burden upon the adjacent lot-owners, for which they were entitled to compensation. There were conflicting decisions in other states, and the court adopted a middle doctrine, sanctioned by the courts of Ohio, that such a road was not an additional burden entitling the lot-owners to compensation, except when some private right of such owner, such as free access to his own land or buildings, has been materially impaired thereby. Reasons at length are not given in the opinion for this conclusion, but it is evident that it cannot be justified except upon the theory that the street railway tends to further and accelerate the original purpose for which the dedication was made,— that of public travel. In the recent case of *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561, this court held that the construction and operation on public streets of an electric railroad extending between several cities or towns, for the transportation of merchandise, baggage, mail and express matter, as well as passengers, is not a mere exercise of the public easement previously acquired by the establishment of such street, but imposes an additional burden thereon, and is the taking of private property, for which the abutting owner is entitled to compensation. Emphasis was laid upon the fact that it was a commercial railway, doing other business than the mere transportation of passengers, and also that the communication was between somewhat distant cities. This case was followed in *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis.

83. But the doctrine was extended so far as to hold that an electric railway running upon the highway through country towns was an additional burden upon the highway. The question whether such a system, operated by the overhead trolley, with its necessary poles, in the streets of a city, was an additional burden, was expressly reserved, and has not yet been determined in this state.

The rights of the abutting lot-owner with reference to the adjacent street has received consideration in several cases. Thus, in *Papworth v. Milwaukee*, 64 Wis. 389, the right of the lot-owner to construct vaults or other areas under a sidewalk, with proper openings therein, was sanctioned, provided it was done in such a manner as not to interfere with or endanger public travel. In *Hay v. Weber*, 79 Wis. 587, a bay window extending over the sidewalk in such a way as not to interfere with travel was permitted. The fair conclusion from this line of decisions is that the abutting owner has all the rights of an absolute owner of the soil, in the streets, subject only to the public easement therein.

It may be admitted that the constitution of the state is the only limit of legislative power over the highways of the state. The lines within which such power is to be restrained are such as were indicated in the *Ford Case*, 14 Wis. 609,—that neither the legislature nor municipal authorities can authorize the taking or incumbering of a public street for purposes inconsistent with its public use, without the consent of the lot-owner, unless some provision for compensation has been made. The extent to which legislative authority may go would be to grant the right of street occupancy, subject to the rights of the owners of the fee. This, it is believed, is all that was intended, and all that the legislature had the right to grant, by the act of the legislature of March 11, 1848. See Terr. Laws of 1848, p. 257. This act gave the right to telegraph companies to construct and main-

tain their lines "from point to point, upon and along any of the public roads . . . within the limits of the territory or state, or upon the land of any individual, the owners of the land through which said telegraph lines may pass having first given their consent," provided the same should be so constructed as not to incommode public use. This law, with some slight amendments, has been carried into the different revisions since that time, and now appears in the revision of 1898 as sec. 1778. While limited in its terms to telegraph companies, this court held in *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, that the telephone company was included within the meaning of the statute. It should be noted, however, that the supreme court of the United States in a recent case came to a different conclusion regarding an act of Congress of similar import. *Richmond v. Southern Bell T. & T. Co.* 174 U. S. 761. As before noted, it is our conviction that this law grants no power to use the street, except as against the public, and was not intended to cut off or limit the rights of the actual owners of the land affected thereby. Without authority from the state, the placing of poles in a street would constitute a nuisance, abatable as such by the public authorities. By this statute the public is foreclosed of the right to object to the poles being in the street; but the right of the adjacent ower remains intact, to be vindicated, when invaded, by the usual processes of the law.

The fact that the power of eminent domain has not been granted to telegraph or telephone companies cannot affect the question. It may be that the companies have not asked for it. The fact that the question has not been brought here before is of no significance, except as indicating how great has been the forbearance of parties whose rights have been invaded.

The argument that whenever a highway has been laid out since 1848 the compensation paid therefor included the use

telephone companies might put it to is specious, but in reality overlooks some very important considerations. In the first place, there is no kinship between the statutes in relation to the taking or dedication of highways and the one in question. They do not relate to the same subject matter, nor, in their purpose, do they concern the same class of people. In the one case a right is given to the entire public; in the other, to a few corporations doing a special business for private gain. The one contemplates only such occupancy as is essential and necessary for the purposes of public travel. The other grants a right of permanent occupancy to a private corporation, conducted for private gain, but doing a business of public utility and convenience. A street may subsist, and the lot-owner have the complete use of his adjacent property. Not so if a portion of the street has been permanently taken by poles and other necessary structures for a telegraph or telephone line. No one doubts but that private rights are affected, by the construction and maintenance of such a line, in a way entirely different from the ordinary uses of a highway. Nor is there room to dispute the fact that such constructions constitute a permanent occupancy of the land, independent of the public use. This occupancy being for the direct benefit of private corporations, and only for the indirect benefit of the public, how can it be said, with any show of justice, that when land is condemned for a street the public must not only pay for *its* use, but also for the use of such *quasi*-public corporations as the legislature has given power to use the highways?

There is also another consideration. In no case that has ever come under our observation, where land has been sought to be condemned, has the fact that the street might be used by a telegraph or telephone company been urged as an element of damages. There are thousands of miles of streets and highways in the state where no telephone poles have ever been set, and where none ever will be set, and it

would be absurd to say that the owners of the fee ever contemplated payment for any other use than that of public travel. There is no parallel between this case and *Huston v. Fort Atkinson*, 56 Wis. 350. The court there asserts that materials in one portion of a highway might be taken to repair an adjacent highway, the purpose being in aid of the public use. Streets have to be made and worked, hills leveled, and depressions filled. Hence it may be said to have fairly been within the contemplation of the parties that the surface should be moved from place to place to carry out the original idea of street-making.

On the general proposition of whether wires and poles are an additional burden for which the abutting owner is entitled to compensation, there is, as stated, a wide divergence of opinion among text-writers and courts. It is universally admitted that the legislature may subject the highway to this use. The question is whether it can be done without compensation to the owner of abutting land. As stated in Keasbey, Electric Wires, 71, the argument on one side is that the easement of highway is intercommunication, or the right to use the highway by the public generally for the purposes of intercommunication. Its purpose has been the transmission of intelligence, as well as for travel and transportation. It has been used by the post horse and mail wagon as well as the coach and the cart. When new modes of travel and new means of communication become necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use; and, if the old use remains unimpaired, the owner of the soil has no reason to complain. Some of the leading cases supporting this view are here noted: *Pierce v. Drew*, 136 Mass. 75; *Irwin v. Great-Southern T. Co.* 37 La. Ann. 63; *Cater v. N. W. T. E. Co.* 60 Minn. 539; *Julia B. Asso. v. Bell T. Co.* 88 Mo. 258; *People v. Eaton*, 100 Mich. 208; *Hershfield v. Rocky Mountain B. T. Co.* 12 Mont. 102; *Magee v. Overshiner*, 150 Ind. 127.

On the other hand, it is argued that the streets were intended primarily for travel and transportation, and that, although they were intended also for the transmission of intelligence, and the telephone and telegraph are used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the landowner ever contemplated such use and occupation. He has only given the right of use for a public highway, and, if he cannot complain of this permanent occupation, there is nothing to prevent the posts being put so as to form a barrier between his land and the street, and the wires from being so numerous as to be annoying and dangerous. The primary law of the highway is motion, and whether vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under, it, but cannot permanently appropriate any part of it. The authorities supporting this view are so numerous that it may be said with confidence that the great weight of judicial opinion is in its favor. We note the following cases: *Eels v. Am. T. & T. Co.* 143 N. Y. 133; *Board of Trade T. Co. v. Barnett*, 107 Ill. 507; *Postal T.-C. Co. v. Eaton*, 170 Ill. 513; *Am. T. & T. Co. v. Pearce*, 71 Md. 535; *Western Union T. Co. v. Williams*, 86 Va. 696; *Chesapeake & P. T. Co. v. Mackinzie*, 74 Md. 36; *Blashfield v. E. S. T. & T. Co.* 71 Hun, 532; *Smith v. Central Dist. P. & T. Co.* 2 Ohio C. C. 259; *Stowers v. Postal T. C. Co.* 68 Miss. 559; *Pacific Postal T. C. Co. v. Irvine*, 49 Fed. Rep. 113; *Nicoll v. N. Y. & N. J. T. Co.* 42 Atl. Rep. 583; *Hewett v. W. U. T. Co.* 13 Wash. L. Rep. 466. See *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380; *Sterling's Appeal*, 111 Pa. St. 35; *Broome v. N. Y. & N. J. T. Co.* 42 N. J. Eq. 141; *Jaynes v. Omaha St. R. Co.* 53 Neb. 631, 39 L. R. A. 751. In addition to the courts, the text-writers quite uniformly subscribe to this doctrine.

Mr. Lewis, in his work on Eminent Domain (§ 131), says: "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, and are entirely foreign to its use." Another writer on this same subject says: "And the sounder rule seems to be that the abutting owner ought to be compensated for all actual injury to his property or the right to use the same." Tiedeman, Mun. Corp. § 297. Randolph on Eminent Domain (§ 407) says that the prevailing opinion is that the plant of a telegraph or telephone company is an additional servitude. See, also, Croswell, Electricity, § 110; Thompson, Electricity, § 18; Elliott, Roads & S. 534, 535; 2 Dillon, Mun. Corp. § 698*a*.

In view of this overwhelming array of courts and law writers in favor of the latter rule, and in view of the adoption by this court of the middle-ground doctrine mentioned in the *Hobart Case*, 27 Wis. 194, we feel compelled to drop into the ranks of the majority, and sanction this rule as the policy and law of this state. Every question and every argument bearing on the situation has been raised and used, and considered and determined, in the cases cited; and nothing that we can say will add to their weight, or be likely to convince the doubting. The suggestion that the adoption of this rule will cripple or destroy the commerce of the state, is weighty, but the rights of the public, or of corporations engaged in conducting business of a public character, cannot be allowed to prevail over the rights of individuals, except in the way pointed out in the constitution. The fact that some of the cases mentioned were decided with reference to the location of poles on country roads does not lessen their weight. If it be a fact, as we believe it is, that in the dedication or condemnation of streets the taking and occupancy of a specific portion for permanent structures was not within the contemplation of the parties, then the argument of the greater rights of the public in city streets fails. The freedom

of use and enjoyment of adjoining property has been interfered with, and a definite portion of both street and highway has been taken, contrary to the original purpose, and without compensation.

On the trial the complaint was objected to as having a double aspect. It was claimed that it contained allegations which would make the action either at law or in equity, to suit the exigencies of the pleader; and the court was asked to compel the plaintiffs to elect as to which aspect of the case they intended to adopt. This request was denied, and the case was submitted to a jury, and a special verdict taken. Afterwards the court became convinced that the suit was one in equity, regarded the findings of the jury as advisory only, and judgment was ordered for defendant, mainly on the theory that the pole in dispute did not constitute an additional burden on the street. Without entering into any formal discussion of the matter, we shall assume, as counsel for both parties and the court have assumed, that the action is one in equity to abate a private nuisance, under ch. 137, Stats. 1898. The proof amply shows that defendant entered upon the plaintiffs' land, and erected an unsightly pole immediately in front of their show window, and which in some degree interferes with the proper enjoyment of their property. Such occupancy constitutes a continuing trespass upon the land, and affords grounds for the intervention of the court.

In view of what has already been said, the decision of the trial court was erroneous. The judgment is therefore reversed, and the cause is remanded with directions to enter judgment for the plaintiffs for the removal of the pole and for the damages found by the jury.

By the Court.— So ordered.

HIAWATHA IRON COMPANY, Respondent, vs. JOHN STRANGE PAPER COMPANY, imp., Appellant.

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February 7—February 27, 1900.

Corporations: Officers: Authority to indorse commercial paper: Promissory notes: Bona fide *purchaser: Notice of fraud.*

1. A provision in articles of incorporation making it the duty of the president "to have general charge, control, and management of the affairs of the corporation, and also to sign all contracts and conveyances," confers express authority upon that officer to indorse commercial paper, which all dealing with the corporation are entitled to rely upon implicitly.
2. The president of a corporation, who had both apparent and express authority to indorse commercial paper in its name, executed his individual notes payable in form to the corporation, and then as president indorsed them in blank in the corporate name and delivered them in payment of his individual debt to a third person. Such indorsement was not authorized by the directors, and the corporation received no consideration therefor. Before maturity the notes were transferred, for an adequate consideration, without further indorsement, to another corporation having no actual knowledge of their infirmity, by a business man in good repute, who had possession and apparent ownership of them. *Held*, that said transferee was a *bona fide* purchaser, and not charged with notice of the fraud upon the indorser by the circumstances under which the notes were purchased or by anything appearing upon their face.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action upon two promissory notes against John Strange, as maker, and the *John Strange Paper Company*, a corporation, as indorser. The corporation defended on the ground that the indorsement of the corporate name upon said notes was made by John Strange in fraud of the corporation, and that the plaintiff was not a *bona fide* purchaser, but took the same with notice of the fraud.

The evidence showed that the notes were in fact executed by the defendant John Strange at Menasha, Wisconsin,

July 12, 1895, payable in form to the *John Strange Paper Company*, and were before delivery indorsed by John Strange in blank upon the back, "*John Strange Paper Co.*, by John Strange, Prt.;" that John Strange was in fact president of the corporation, but that the corporation received nothing for such indorsement, and that such indorsement was not authorized by the directors; that the notes were then delivered to one Charles R. Smith in payment of the individual debt of John Strange; that the plaintiff corporation purchased the notes before maturity, at Iron River, of one M. H. Ballou, who then had the notes in his possession as apparent owner, and gave in exchange therefor 750 shares of its own capital stock, which consisted of one quarter of the entire capital stock of the corporation. The evidence tended to show that the corporate property of the plaintiff consisted of leased interests in an iron mine partially developed, and the machinery and supplies owned and used in connection therewith, and that it was reasonably worth $30,000 at the time of the purchase of the notes. The notes were not indorsed by Smith or by Ballou, and the evidence showed that the plaintiff's directors who made the purchase had no knowledge at the time of the circumstances under which the notes were executed. The notes were duly presented for payment when due, and protested for nonpayment.

The articles of incorporation of the defendant corporation prescribed the duties of the president to be, among other things, "to have the general charge, control, and management of the affairs of the corporation, and also to sign all contracts and conveyances."

The jury found a special verdict, in answer to proper questions, to the effect that (1) the notes were obtained from the *John Strange Paper Company* through fraud; and (2) the directors of the plaintiff company purchased such notes in good faith. Upon this verdict, judgment was entered in favor of the plaintiff against both defendants for the sum of $6,211 36, being the principal and interest of the notes,

and for costs; and from this judgment the defendant corporation appeals.

Silas Bullard and *J. C. Kerwin*, for the appellant, contended, *inter alia*, that the special relation existing between John Strange, maker, and his principal, the defendant payee, disqualified the former to make the indorsements and negotiate the notes unless specially authorized so to do. Strange could not in his official character as president indorse his own notes and negotiate them and thus obtain the money upon them so as to cut off equities existing in favor of his principal, the defendant. *Haywood v. Lincoln L. Co.* 64 Wis. 647; *Cook v. Berlin W. M. Co.* 43 Wis. 442; *Cumberland C. & I. Co. v. Sherman*, 30 Barb. 553; *Walworth Co. Bank v. Farmers' L. & T. Co.* 16 Wis. 658; *N. Y. I. Mine v. First Nat. Bank*, 39 Mich. 644; Story, Agency, § 210; Tiedeman, Comm. Paper, § 82; *Claflin v. Farmers' & C. Bank*, 25 N. Y. 293; 2 Randolph, Comm. Paper, § 1014; *Lee v. Smith*, 84 Mo. 304; *Third Nat. Bank v. Marine L. Co.* 44 Minn. 65; *Stough v. Ponca M. Co.* 54 Neb. 500; *Anderson v. Kissam*, 35 Fed. Rep. 699; *West St. L. S. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Smith v. Los Angeles I. & L. C. Asso.* 78 Cal. 289; *Wilber v. Lynde*, 49 Cal. 290. The notes with the indorsements showing the relation between the maker and the payee constitute notice to the plaintiff. *N. Y. I. Mine v. First Nat. Bank*, 39 Mich. 644; 1 Parsons, Notes & Bills, 259; 2 Randolph, Comm. Paper, § 1012; 1 Daniel, Neg. Inst. §§ 796, 799; *Goodman v. Simonds*, 20 How. 367; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Davis v. Seeley*, 71 Mich. 209; Tiedeman, Comm. Paper, § 82; *Claflin v. Farmers' & C. Bank*, 25 N. Y. 293; *Starin v. Genoa*, 23 N. Y. 452; *Titus v. Great Western T. Road*, 61 N. Y. 237; *San Diego v. S. D. & L. A. R. Co.* 44 Cal. 112; *Pickett v. School Dist.* 25 Wis. 551; *Bank of N. Y. N. B. Asso. v. Am. D. T. Co.* 143 N. Y. 564; *Griffiths v. Kellogg*, 39 Wis. 294. The plaintiff was guilty of bad faith. It wilfully shut its eyes against knowl-

edge open and apparent to it of the infirmity of the paper. *Oak Grove & S. V. C. Co. v. Foster*, 7 N. M. 650; 1 Parsons, Notes & Bills, 259; 1 Daniel, Neg. Inst. §§ 796, 799, 801; 2 Randolph, Comm. Paper, § 1012; *New York I. Mine v. First Nat. Bank*, 39 Mich. 644; *Cheever v. P. S. & L. E. R. Co.* 72 Hun, 380; *Chemical Nat. Bank v. Wagner*, 93 Ky. 525; *Davis v. Rockingham I. Co.* 89 Va. 290; *Wilson v. Metropolitan E. R. Co.* 120 N. Y. 145; *Shaw v. Spencer*, 100 Mass. 388; *Goodman v. Simonds*, 20 How. 367.

For the respondent there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *H. O. Fairchild.*

WINSLOW, J. The notes in question were executed by Strange in payment of his individual debt to Smith, and it is admitted that the indorsement of the corporation was an accommodation indorsement, and was placed thereon by Strange, as president, without authority and without consideration, and consequently that the corporation was not bound by such indorsement to the original holder of the notes, or any subsequent indorsee who took them with notice of the facts. They were transferred to the plaintiff, for what must be considered an adequate consideration, before maturity, and with no actual knowledge of the infirmity in them, by a business man in good repute, who had possession and apparent ownership of them; and the only question in the case is whether the plaintiff was charged with notice of fraud upon the corporation by the circumstances under which it purchased the notes, or by anything appearing upon the face of the instruments themselves.

The appellant was a trading corporation, and it had undoubted power to receive commercial paper for debts owing to it, created in the course of its business. *Rockwell v. Elkhorn Bank*, 13 Wis. 653. From this it necessarily follows that it had also power to dispose of such paper by indorse-

ment or assignment as may suit its purpose. 1 Daniel, Neg. Inst. §§ 384, 385. When a corporation possesses this general power to become a party to commercial paper, such paper will be presumed to have been executed in the legitimate course of its business, and will be valid in the hands of a *bona fide* purchaser for value, whether executed in the usual course of business or not. 1 Daniel, Neg. Inst. § 386. An indorsement in blank is valid according to the law merchant, and does not affect a subsequent holder with notice of infirmities, or put him upon inquiry. *Lyon v. Ewings*, 17 Wis. 61. A corporation must necessarily act through an officer or agent in making an indorsement, and the indorsement will ordinarily be valid in the hands of a *bona fide* holder before maturity, if made by an officer or agent having actual authority to indorse commercial paper on behalf of the corporation, or by an officer or agent who is apparently clothed with such authority by the corporation, even though the indorsement be an accommodation indorsement and a fraud on the corporation. *Houghton v. First Nat. Bank*, 26 Wis. 663.

In the present case, John Strange, who indorsed the notes on behalf of the corporation, not only had for years transacted the corporation's financial business of this character, and thus been clothed with apparent authority to indorse commercial paper, but he had also express authority, by the articles of incorporation, "to have general charge, control, and management of the affairs of the corporation, and to sign *all* contracts and conveyances." This is a very broad and sweeping grant of authority, and must be held to include the indorsement of commercial paper; and it was an authority publicly proclaimed to the world, and which all dealing with the corporation were entitled to rely upon implicitly. Now, had the notes in suit in this case been the notes of some third person running to the corporation, and indorsed, as these notes were, in the corporate

name and by the proper officer, there can be no doubt that the corporation would be bound by such indorsement the moment such notes came into the hands of a *bona fide* purchaser for value before due, although in fact it never owned the notes and the indorsement was a fraud upon it. Upon their face, such notes would appear to have been notes taken by the corporation in the transaction of its business, and, being indorsed in the corporate name by the officer both apparently and actually authorized to indorse commercial paper for the corporation, a purchaser in good faith before maturity would not be bound to inquire whether the corporation owned it when it was indorsed or not, but would be entitled to assume that the relations of all the parties to the paper were precisely what they appeared to be upon its face. *Houghton v. First Nat. Bank*, 26 Wis. 663; *Hoge v. Lansing*, 35 N. Y. 136; *U. S. Nat. Bank v. First Nat. Bank*, 64 Fed. Rep. 985; *Warren-Scharf A. P. Co. v. Commercial Nat. Bank*, 97 Fed. Rep. 181.

But it is claimed that the fact that the notes on their face showed that they were given by the president of the corporation to the corporation itself was a fact which required a purchaser to inquire into the real nature of the transaction before purchasing them. Had the parties to the paper been reversed, and the notes been the notes of the corporation, executed by Strange and payable to Strange individually, a purchaser would doubtless have been put upon inquiry, because the notes would then have shown on their face that an officer of the corporation had dealt directly with himself and adversely to the interests of the corporation. *Haywood v. Lincoln L. Co.* 64 Wis. 639; *Third Nat. Bank v. Marine L. Co.* 44 Minn. 65; *Stough v. Ponca M. Co.* 54 Neb. 500; *Lee v. Smith*, 84 Mo. 304. And, again, had Strange given his note to a third person, and before delivery placed the corporate indorsement upon it, it might well be that a purchaser of such paper would be charged with notice of the

fact that the corporate indorsement was for accommodation only, and not in the course of business, and hence that he must inquire into the question of actual authority. *West St. Louis S. Bank v. Shawnee Co. Bank*, 95 U. S. 557. But we have no such case here. The notes upon their face import simply that Strange was indebted to the corporation and executed his notes to secure that indebtedness. This occurs frequently, and there is nothing either in the laws of business or good morals which prevents or disapproves of such a transaction. A corporation may deal with its officers, and take their notes for indebtedness resulting from such dealings. So far as appears on the face of the paper, the directors of the corporation may have required Strange to execute the notes. There is nothing on the face of the notes to indicate anything more than an ordinary business transaction.

We conclude that the undisputed evidence shows that the plaintiff was a *bona fide* holder of the notes for value, before maturity, and in the regular course of business. This conclusion renders unnecessary any discussion of exceptions reserved to portions of the charge, as well as the errors claimed because of the refusal to nonsuit the plaintiff and the refusal to grant a new trial.

A verdict for the plaintiff should have been directed.

By the Court.— Judgment affirmed.

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FRANKE and others, Respondents, vs. MANN and others, Appellants.

February 8 — February 27, 1900.

(1) *Appeal: Assignment of errors: Insufficiency of evidence.* (2–6) *Religious societies: Notice of organization:* De facto *corporation: Evidence: Findings: Diversion of trust property: Injunction.*

1. As a general rule a judgment will be affirmed on appeal unless prejudicial error is made to appear affirmatively. Errors should be definitely assigned and a good-faith attempt made to present them to the court; and where the claim is that a finding of fact is contrary to the evidence, the evidence or want of evidence bearing on the question should be brought to the attention of the court.
2. Where incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith, no notice of the intent to so organize, or of the time or place of forming the organization, is necessary under sec. 1990, Stats. 1898.
3. In a *bona fide* attempt to comply with the statute authorizing the formation of religious corporations, articles were drawn and signed in proper form except as to the acknowledgment, and were recorded, and the corporation was organized by the election of trustees, and the right to exercise the franchise of being a corporation asserted, and such franchise used in good faith for a number of years without objection. *Held*, that although no notice of the purpose to organize a corporation was given pursuant to sec. 1990, R. S. 1878, there was a corporation *de facto* at least, the legality of whose organization cannot be questioned in a controversy between its members as to the uses to which its property shall be put.
4. In an action by members of a religious corporation to restrain diversion of its property from its legitimate use, findings of the trial court to the effect that the corporation had been organized as a society of a certain church or sect, and that the property had been deeded to its trustees for its use in harmony with the purposes of its organization, are *held* to be sustained by the evidence.
5. Where a religious society is organized as a corporation of a certain church or sect, under the jurisdiction and government of a synod, land conveyed to its trustees for church purposes is held in trust for that particular use, and its diversion by such trustees, even by the will of a majority of the members of the society, to other and inconsistent uses (such as the uses of a different sect) will be restrained at the suit of the minority.

APPEAL from a judgment of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Equitable action to prevent members of a religious corporation from perverting the use of its property.

The issues made by the complaint were decided by the trial court substantially as follows:

(1) On May 13, 1888, for some years theretofore, and ever since, the German Evangelical Synod of North America has existed in Wisconsin and other states as a religious corporation separate and distinct from all others, and has been and is made up of people whose beliefs on religious and church questions differ materially from those of any other church or sect, particularly from the belief of the members of the Lutheran or German Lutheran Church.

(2) At the time stated Wisconsin was a district of such synod, having a form of government binding the different church societies composing it to the distinct belief of the sect known as the "German Evangelical Church."

(3) On May 13th, aforesaid, at the town of Wayne, La Fayette county, Wisconsin, several persons named in the complaint, competent for the purpose, members of the German Evangelical Church and its Synod of North America, for the purpose of forming a religious society of such sect and synod, made a certificate of organization for a church corporation, in good faith, intending to comply with the laws of this state on that subject, but failed to have the execution of such certificate acknowledged, though they caused the same to be recorded in the office of the register of deeds of La Fayette county May 29, 1888, and thereafter, on May 4, 1897, seven of the fifteen signers of the certificate duly acknowledged the same and caused the certificate thereof to be recorded in the margin of the record of the articles.

(4) The day the articles of organization were signed the signers held their first meeting and duly elected trustees, and thereafter a corporate organization was maintained, the

right to be a corporation asserted, and the corporate franchise accordingly used down to the time of the commencement of this action, the defendants, except the defendant *Schlicting*, being then the trustees.

(5) The corporation, till 1896, submitted to the government and direction of the German Evangelical Synod of North America, and recognized its authority as a superior governing power in all respects according to the ecclesiastical law of the synod. The Wayne church society, together with two other such organizations, was presided over during the time mentioned by ministers of the German Evangelical Church, designated for that purpose by the synod of the sect for North America, and took part, in the manner provided by the rules of the sect, in the district conferences and conventions of the church for the district of Wisconsin.

(6) Substantially all members of the society, including plaintiffs and defendants, signed their names in a book kept for that purpose, as did the members of the other churches of the sect presided over by the same minister, as aforesaid, purporting thereby to adopt the synodical rules and regulations prescribed for such purposes. Such rules were not formally adopted by a vote of the members of the society or by any formal corporate act. The individual members of the society signed the book at the request of the minister as and for a submission of the society to the rules, and such rules were submitted to by the society and the members thereof up to about the year 1896.

(7) The subordinate organizations of the German Evangelical Synod of North America are bound by its constitution and system of government to submit thereto in all matters, including the religious belief of the church and its forms and ceremonies, and not to employ a pastor other than a member of the German Evangelical Church, ordained by the synod of such church for North America, holding its

certificate of good character and behavior, and who shall subscribe a written promise to be faithful to the rules and regulations of such society and synod.

(8) The society built a church edifice on lands described in the complaint, donated to the society for that purpose by *Wilhelm Taufmann*, one of the plaintiffs. The conveyance was made in form to the trustees of the German Evangelical St. Paul's Society of the Town of Wayne, La Fayette County, Wisconsin, for the use of such society. It was accepted by the corporation, with knowledge of its provisions by substantially all the members of the society, and without objection as to the use declared. There was some talk by individual members of the church about the property being made free to all sects except Roman Catholics, but that was never favored by the society as such.

(9) The church building was paid for by money contributed by its members, was duly dedicated as property of a society of the German Evangelical Synod of North America, and was used in harmony therewith till some time in 1896, when, on account of difficulty about obtaining a minister to serve the society, defendant *Schlicting*, a minister of the Lutheran Church and sect, materially different in its religious belief and distinct from that of the Wayne society, was employed to serve it for one year, at the end of which period a majority of the members of the society again employed *Schlicting*, the minority protesting on the ground that they desired and were entitled to have a minister in harmony with the society as a member of the German Evangelical Church Synod of North America. Pursuant to such employment, notwithstanding such protest, *Schlicting* served the society till interfered with by the temporary injunction granted in this action, and in so doing confined his ministrations in harmony with the sect to which he belonged, the German Lutheran Church, preaching the belief of such sect, which, as before indicated, was materially out of harmony

with the religious belief of the German Evangelical Church of the Synod of North America, and assumed the right to, and did, prevent the use of the church edifice by a minister of the society to which the church belonged.

On such facts the court concluded:

(1) The German Evangelical St. Paul's Society of the Town of Wayne, La Fayette County, Wisconsin, since May, 1888, has been a church corporation under the laws of this state, subject to the system of church government of the German Evangelical Synod of North America.

(2) The title to the church edifice and property described in the complaint is held in trust by the trustees of the Wayne society, for the use of such society as an organization of the German Evangelical Synod of North America, and for the exclusive use of such society in harmony with the religious views of the German Evangelical Church and such synod of such sect.

(3) Defendants having perverted the property of such society from its legitimate use, plaintiffs, though constituting a minority of the members of the society, have a right to such redress as will prevent the further perversion of its property, and as will compel the use of such property in conformity with the religious belief of the German Evangelical Church and the system of government of the synod of such church for the district in which the society is located.

(4) Plaintiffs are entitled to judgment accordingly and as prayed for in the complaint.

Judgment was rendered in accordance with the aforesaid conclusions, from which this appeal was taken.

For the appellants there was a brief by *Wilson & Martin*, and oral argument by *H. C. Martin.*

For the respondents there was a brief by *Orton & Osborn* and *Thomas Luchsinger*, and oral argument by *P. A. Orton.* To the point that property acquired for the religious

uses of any church, sect, or denomination of Christians must be sacredly preserved for such particular uses and purposes, and that it may not be perverted to other uses, even by a majority of the members of the organization, they cited, besides cases cited in the opinion, *Krecker v. Shirey*, 163 Pa. St. 534; *White v. Rice*, 112 Mich. 403; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Roski's Appeal*, 69 Pa. St. 462, 8 Am. Rep. 275; *Fuchs v. Meisel*, 102 Mich. 375; *Lynd v. Menzies*, 33 N. J. Law, 164; *Auracher v. Yerger*, 90 Iowa, 558; *Schweiker v. Husser*, 146 Ill. 399; *Russie v. Brazzell*, 128 Mo. 93; *Schlichter v. Keiter*, 156 Pa. St. 119.

MARSHALL, J. Thirty-six exceptions were filed to the findings of fact, but counsel for appellants made no specific assignment of error in regard to such findings in accordance with the rules and settled practice of the court. We find in counsels' brief a statement of their claim in a general way, and a statement that the court erred in so far as the findings and conclusions of law are inconsistent with such view, and on that we are referred to the pages of the printed case where the findings and conclusions of law may be found, and in like manner to the exceptions thereto, particularly to twelve of such exceptions by their numbers. No attempt was made by counsel in their brief to point out evidence that is contrary to the findings or want of evidence to support them, but it is suggested that we carefully study the printed case of 143 pages, with a view of discovering whether any of the exceptions were well taken or not. With such a presentation of the appeal, judicial duty requires only a sufficient examination of the case to determine whether the findings and pleadings support the judgment. Error is presumed against on appeal, and unless, as to the facts at least, that is met by some distinct assignment of error or errors, and some attempt to discuss such assignments and to point out evidence or want of evidence to warrant them or

some of them, it will prevail. The general rule is that a judgment on appeal will be affirmed, unless prejudicial error not only exist, but be made to affirmatively appear. *Eaton v. Patchin*, 20 Wis. 485; *Milwaukee H. Co. v. Teasdale*, 91 Wis. 59; *Menz v. Beebe*, 102 Wis. 342; *Alexander v. Irwin*, 20 Neb. 204; *Pottawattamie Co. v. Marshall Co.* 56 Iowa, 410; *McVey v. Johnson*, 75 Iowa, 165; *Papke v. Papke*, 30 Minn. 260. That rule means more than that error may be discovered in the record. It requires that the person alleging error must point it out and make it affirmatively appear in accordance with the rules and practice of the court. That requires error to be definitely assigned and a good-faith attempt made to present it to the court for consideration; and where the claim is that a finding of fact is contrary to the evidence, that the evidence, or want of evidence, bearing on the question, be brought to the attention of the court.

From the foregoing it is plain that this court would be justified in disregarding all contentions of the appellants' counsel that the findings of fact are contrary to the evidence. However, the labor put upon the case indicates so clearly that the appeal was taken in good faith, and that the omission to comply with the rules and practice governing the matter was not intentional, that the neglect may be easily excused in the interest of justice, particularly to the parties whose rights are involved. That has been done, and the record examined carefully, and with more labor than would have been necessary had the evidence or want of evidence relied upon been definitely pointed out.

We are unable to discover any substantial conflict in the evidence on many of the material points, and no clear preponderance of evidence against any of the facts found. The evidence appears to be all one way that the church corporation was formed for the purposes of a religious sect known as the "German Evangelical Church," under the jurisdiction and subject to the government of the established body

of that church in this country, and in the Wisconsin district thereof, known as the German Evangelical Synod of North America; that such sect has distinguishing characteristics of a material character, wherein it differs from all other churches, particularly from the German Lutheran Church, both as regards religious belief and church organization and government; that the land upon which the church edifice was constructed was deeded to the corporation in trust for its use in harmony with the purposes of the organization and none other; that the edifice was erected and paid for with the same view, and that it was dedicated to religious uses according to the religious belief, customs, and government of the German Evangelical Church, particularly of the synod of such church of North America; that the church society was conducted and its property used in strict harmony with the purposes of its organization till a short time before the commencement of this action; that the defendants perverted the property of the society to purposes foreign to the legitimate use thereof, and that there was no peaceable way of redressing the wrong to the corporation and the minority of its members, except by invoking the power of the court.

It is said that when the deed of the land on which the church edifice stands was delivered to the society, the grantor promised that it should be free, except to Roman Catholics, and that subscriptions were made to aid in the construction of the edifice with the same view. Further, that the persons who organized the church society were not members of the German Evangelical Church, but were members of the German Lutheran Church. We fail to find evidence in the record to sustain such claims. True, as the court found, there was some talk by members of the church society respecting the church edifice being free to all sects except Roman Catholics, but the deed was in fact made and delivered to the society for the purposes of its organization, indi-

cated in its articles of organization, and the society accepted it for that use. That fixed the status of the property irrevocably, as regards the power of the corporation over it, acting by defendants, whether by the will of a part or all of its members. *Fadness v. Braunborg*, 73 Wis. 257; *McBride v. Porter*, 17 Iowa, 203; *Sutter v. Trustees*, 42 Pa. St. 503; *Lawson v. Kolbenson*, 61 Ill. 405. The rule in that regard, as it prevails generally, was stated in *McBride v. Porter*, *supra*, in the following language: "The grantees take the title thereof subject to this limitation, and it is not in the rightful power of the minority, or of the majority, or even of the whole congregation, to divert the property from the use and trust for and with which it was conveyed. The parties receiving the title take the same for control, and it is peculiarly within the province of a court of equity to enforce the trust, and, in its enforcement, the court will look to the trust specified and intended, and must disregard all questions as to majority or as to religious creed and belief except so far as shall be necessary to ascertain the trust intended and the application of the property accordingly."

It is further suggested that no notice was given of the purpose to organize a church corporation May 13, 1888, when the articles of organization were signed, as required by sec. 1990, R. S. 1878; hence that such articles are void, and the findings of fact inconsistent with that view contrary to the evidence. To that there are at least two conclusive answers. Where incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith, no notice of an intent to so organize, or the time or place of forming the organization, is necessary. Such were the circumstances under which the society in question was organized, according to findings supported by evidence. But waiving that, there was a statute permitting the formation of such a corporation, an attempt in

good faith to comply therewith, and articles were drawn and signed in form as the statute required, except as to the acknowledgment. They were recorded, the corporation was organized, and the right to exercise the franchise of being a corporation asserted, and such franchise in good faith used, all the persons who are parties to this action concurring, except defendant *Schlicting*, for several years. Such circumstances created a corporation *de facto* at least, which is sufficient for the purposes of this case. *Bergeron v. Hobbs*, 96 Wis. 644; *Slocum v. Head*, 105 Wis. 431.

It is further contended, as a reason why the finding of fact, to the effect that a corporation of the German Evangelical Church of the Synod of North America was organized by and pursuant to the articles signed May 13, 1888, is contrary to the evidence, that such was not the intention of those who participated in what occurred at the time. There seems to be but very little room, if any, for controversy on that point. The person who drew the articles of organization, and under whose direction they were signed, was a minister of the denomination of Christians known as the German Evangelical Church, and a minister of the synod of such church for North America. He framed such articles for the purpose of forming a corporation of his church, and in harmony with the wishes of those who signed them. There is ample evidence as to that. The articles were signed at a meeting at which substantially all who had been accustomed to meet in Wayne to listen to religious teaching of the German Evangelical Church were present. The minister read the articles and explained them, and did likewise with the rules of the church. There is no sufficient evidence to rebut the presumption that all the signers of the articles knew what they contained. In them is the following language: "The undersigned, . . . and those who are or may become associated with them for the purposes herein specified, have organized themselves into a religious

society of the German Evangelical Synod of North America, located in the town of Wayne, county of La Fayette, state of Wisconsin." There is no mistaking the meaning of such language.

The contention that the deed of the land on which the church stands was made for the use of a free church, barring only Roman Catholics, and that the finding is contrary to the evidence on that point, is quite as infirm in its supports as the claim in regard to the intent of the incorporators to form a society of the German Evangelical Synod of North America. As before indicated, the language of the deed vests the title to the property in the grantees for church purposes, meaning, obviously, such church purposes as the society was organized for. That read into the instrument, in effect, the words "as a religious society of the German Evangelical Synod of North America." If we look to the circumstances under which the deed was executed, the fair preponderance of the evidence is that the grantor and the grantees intended that the property should be devoted exclusively to the purposes for which the church corporation was organized; that is, the purposes of a society of the German Evangelical Synod of North America. Before the deed was drawn the grantor, with several members of the church, took advice as to how it should be worded, particularly as to the grantees, having present at the time the articles of organization of the society. The grantor testified that he made no promise before the deed was delivered, except to give the land to the society. When the deed was delivered it was read carefully, a large number of the members of the society being present, and there was evidence that it was afterwards read publicly in church and was fully approved.

We will not further discuss the evidence, but close this branch of the case by saying that a careful reading of the record leads to a satisfactory conclusion that all of the findings, to the effect that the property in question is held by

the church society for its use as an organization of Christians of the belief of the German Evangelical Synod of North America, and as a church society of such synod, are in the main supported by the uncontradicted evidence or the preponderance of the evidence, and that no material question, at least, was determined contrary to the clear preponderance of the evidence.

We come now to the broad question of whether a majority of the members of a church corporation, organized as a body of Christian believers of a particular sect, can devote its property to a use inconsistent with the purposes of the corporation. That question, it would seem, on the most familiar principles, requires a negative answer. It is the law of such corporations, the same as of all others, that they cannot lawfully divert their property to uses in disregard of the limitations contained in the acts creating them. There is no difference between church and other corporations in that regard. Church corporations are creatures of the law the same as business or municipal corporations, and when it comes to property rights a court of equity has the same power to protect the minority in the one as in the other. If every taxpayer in a city but one were to favor the use of public property for a purely private use, the one, backed by the power of the court, would prevail. If all of the stockholders of a business corporation but one were to favor the use of the corporate property for something entirely foreign to the purposes of the corporation, the one stockholder, with right on his side, and the power of the court to enforce it, would control and prevent the mischief. The power of a religious corporation as to the use of its property is limited by its organic act the same as any other. When it exceeds such limitations its acts are *ultra vires*, and the court, at the suit of a member of it, will apply the proper preventive or restorative remedy where there are no superior equities in the way.

The law as above indicated was definitely declared by this court in *Fadness v. Braunborg*, 73 Wis. 257. Attention was there called to the wording of the various provisions of ch. 91, R. S. 1878, under which church corporations are created. Sec. 1990 authorizes the creation of such corporations, each limited, however, in its purposes, to those of a particular sect and a particular society of such sect, or to persons of a particular religious belief and a single society thereof. Other sections place such corporations, in all essential particulars, under the same restrictions as to their business affairs as those of other corporations existing under the statutes. It was said in the *Fadness Case*, in effect, that if officers temporarily in charge of the corporate affairs divert its property from the legitimate uses of the corporation, as limited by the grant of such property to it, or the purposes of its organization as regards the particular religious faith it was organized to promote, a court of equity has ample power to interfere to protect the minority; for as to such matters the right of each member of the church society is the equal of every other, and the rights of all are referable to the terms of the trust upon which the corporation property is held, which trust, as indicated, may be declared in the conveyance of the property to the corporation so far as not inconsistent with its corporate powers, or by the articles of organization limiting and defining its rights and those of its members. By submitting to the law of the state in forming a corporation under the statutes, and vesting the title to the property of a church society in it, the members thereof become irrevocably bound by the limitations upon corporate power incident to such artificial bodies.

Evenson v. Ellingson, 67 Wis. 634, is to the same effect. It was there suggested that the policy of the state was to limit the purposes of a church corporation under the statute to those of a single society, particular sect, or body of persons of like religious belief, to avoid just such dangers as

threatened the minority of the society under consideration,— the danger of schismatic differences causing contentions among factions for the control and use of the property of the society. The law wisely precludes the hope of factional, exclusive enjoyment of property, furnishing stimulus to church differences. Experience has taught that the cohesive power of mutual material interests, even those that are aids to spiritual enjoyment and welfare, present and future, is generally as powerful to promote, in church affairs, the dwelling together of brothers in harmony, as matters of doctrine. The benefit of that influence is secured where persons are incorporated as members of a particular sect and church, and vest the title to their church property in such corporation. So fenced about, a faction of a church community, however large, can neither withdraw and claim a part or any of the church property, nor remain and divert its use to purposes foreign to the purposes of the corporation.

Cases exist, involving corporate control over property not impressed with a trust for a particular use by the instrument of conveyance or by the act of incorporation, some of which have been brought to our attention, and many more might have been cited; but they do not apply. Sec. 3, ch. 60, p. 212, 2 Rev. Laws N. Y. 1813, that forms the basis for some of such decisions, which are referred to in other adjudications as authority, was said in *Petty v. Tooker*, 21 N. Y. 267, to expressly confer upon trustees of a church corporation organized under it absolute power of control as regards the religious use to which the property may be devoted. Here the statutes give to trustees of a religious corporation formed under them the same control over its property as is given to other corporations. The power is limited to the particular purposes expressly or impliedly named in the act of incorporation.

What has been said is in harmony with the law regarding

trusts for religious uses, whether the trustees be officers of a religious corporation or of an unincorporated ecclesiastical body, as indicated by the numerous authorities cited in the brief of counsel for respondents, among which are the following: *Ferraria v. Vasconcellos*, 31 Ill. 25; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138; *White Lick Q. M. F. by Hadley v. White Lick Q. M. F. by Mendenhall*, 89 Ind. 136; *Lamb v. Cain*, 129 Ind. 486; *Miller v. Gable*, 2 Denio, 492; *Schnorr's Appeal*, 67 Pa. St. 138; *Stebbins v. Jennings*, 10 Pick. 172; *Baker v. Fales*, 16 Mass. 503; *Smith v. Pedigo*, 145 Ind. 361; *Hale v. Everett*, 53 N. H. 9.

The governing idea in all such cases is that property held by the trustees of a church society has impressed upon it a character in harmony with the creation of the trust, and that any change of such character is a violation of such trust. If property be conveyed to trustees for use of the corporation, and its organic act proclaims the religious belief of its members and sect to which it belongs, so as to indicate clearly the particular use intended by the grantor, or the conveyance expressly indicates the particular use intended by the grantor, or the conveyance expressly indicates the limitations upon such use, or if a corporate organization be formed as a society of a particular church and it becomes possessed of property in any way in trust to that end, in either case the property is held in trust for the use so indicated, and such use cannot be perverted without consent of all the parties to the trust.

Our attention is called to *Watson v. Jones*, 13 Wall. 679, as supporting the view of appellants, but it is in strict harmony with the foregoing. Justice MILLER there classified controversies that had been before the courts, concerning rights of property held by ecclesiastical bodies, as follows:

(1) Cases where property forming the subject of controversy was, by the terms of the deed or will of the donor, or other instrument by which the property is held, devoted to

the teaching, support, or spread of some specific form of religious doctrine or belief.

(2) Where property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority.

(3) Cases where the religious corporation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory, over the whole membership of that general organization.

In the first class of cases it was said the property cannot legally be diverted from the purposes of the trust, whether the donee be an independent church or the member of a larger church organization to which it owes obedience. In the second class it was said, where the character of the organization is such that its members, in such manner as may be prescribed by the plan of organization, may freely deal with its property, and such property is not impressed with any trust other than that of the general use for the purposes of the organization as a religious society, its trustees, for the time being, in power, according to the rules of the society, can control the use of the property within the general purposes of its ownership. In the third class of cases it was said, where the control of property is dependent upon the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest church tribunal within the organization, the civil court will accept and follow the ecclesiastical determination.

It will be seen that the idea which prevails at every point is that a trust impressed upon property, if there be one, can-

not be legally violated. As was said, in effect, in *Miller v. Gable*, 2 Denio, 492, a single member of a church will prevail against a dozen to prevent a violation of a trust for a particular religious use of the church. And in *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 188, a minority of the members of the church, however small, may prevent the diversion of the property held by it in trust to promulgate a particular religious faith.

The instant controversy cannot properly be located in the second class mentioned in *Watson v. Jones*, 13 Wall. 679. The Wayne society is not strictly an independent church society. It was made, by its articles of organization, a society of the German Evangelical Synod of North America. Again, the property was conveyed to the church, as has been stated, for a particular use, within the first class of cases mentioned. This is not a case where there is no specific trust impressed on the corporate property in the hands of the church; neither is it a cause dependent upon a determination of some ecclesiastical question.

Again, we are not dealing with a controversy regarding which of two factions, claiming to belong to the same sect, is entitled to control its property, the decision involving some question of doctrine, or other ecclesiastical question, as in *Wehmer v. Fokenga*, 57 Neb. 510; nor is it a case where a corporation, organized without reference to synodical relations, afterwards gave allegiance to a particular synod, and later a faction attempted to sever such allegiance, as in *Fadness v. Braunborg*, 73 Wis. 257, and *Lawson v. Kolbenson*, 61 Ill. 405. The controversy is whether members of a corporation, created as a synodical church society, and expressly limited by its organic act as to its association with other churches, and the trust character of its property, and by the conveyance of such property to it, merely because they are in the majority, can violate that trust and be free from the power of a court of equity to remedy the wrong at the suit of the

minority. The answer to that has been indicated. The decision of the circuit court was right. The judgment must be affirmed.

By the Court.—So ordered.

SMELKER and another, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

106 135
112 [1]600
56 LRA 177

February 8—February 27, 1900.

Attorney's lien in tort action: Enforcement after compromise between parties: Remedies: Notice.

1. Sec. 2591*a*, Stats. 1898 (providing that any person having or claiming a cause of action sounding in tort or for unliquidated damages may contract with any attorney to prosecute the same and give him a lien thereon as security for his fees, and that when notice of such agreement shall have been given to the opposite party or his attorney no settlement shall be valid as against said lien), does not authorize a splitting up of a cause of action without the consent of the wrongdoer or debtor and the maintenance of an independent action by the attorney to recover his fees, but in case of a settlement between the parties without the consent of the attorney his remedy is in the original action, which he may prosecute to final judgment in his own behalf as though no settlement had been made.
2. A notice in such a case merely stating that the claimant had given the attorney a lien upon the cause of action as security for his fees is *held* insufficient to charge the person against whom the claim is made with notice of an assignment of a specific interest therein.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

The complaint alleges that plaintiffs are attorneys at law; that the defendant is a railroad company; that in August, 1895, one James A. Harris, while riding on one of defendant's trains, was thrown off and injured, so as to require the amputation of both arms above the wrist; that thereafter Har-

ris lawfully contracted with plaintiffs to bring an action against defendant for $30,000 damages on account of said accident; that plaintiffs were to receive one third of the amount recovered or received on a settlement; that plaintiffs commenced such action; that they gave defendant notice of their lien upon such cause of action; and that thereafter the defendant settled said action with Harris for $2,000, without the knowledge or consent of plaintiffs, no part of said sum having been paid to or received by them. Judgment is demanded for $1,000. The answer denies any knowledge or information sufficient to form a belief that the settlement mentioned was made without plaintiffs' consent or knowledge, or that no part of the money received by Harris had been paid to plaintiffs, and set out the settlement in full made with Harris.

The action was tried by the court, a jury having been waived. On the trial an objection that the complaint did not state a cause of action was overruled. Plaintiffs' testimony supported the allegations of the complaint, and showed that the original action had not yet been dismissed. The defendant offered no testimony. Findings were made in favor of plaintiffs and judgment entered for one third of the amount of the settlement, with interest and costs, from which the defendant has taken this appeal.

For the appellant the cause was submitted on the brief of *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel.

For the respondents there was a brief by *Aldro Jenks* and *J. P. Smelker*, attorneys *pro se*, and oral argument by *Mr. Jenks*. They contended, *inter alia*, that an independent action can be maintained. *Larned v. Dubuque*, 86 Iowa, 166; *Parsons v. Hawley*, 92 Iowa, 175; *Winslow v. C. I. R. Co.* 71 Iowa, 197; *Lavender v. Atkins*, 20 Neb. 206; *Lamont v. W. & G. R. Co.* 2 Mackey, 502, 47 Am. Rep. 268; *Farry v. Davidson*, 44 Kan. 377; *Rind v. Hunsicker*, 24 La. Ann. 571;

North Chicago St. R. Co. v. Ackley, 58 Ill. App. 572; *Elliott v. Leopard M. Co.* 52 Cal. 355; *Covington v. Bass*, 88 Tenn. 496; *Louisville & N. R. Co. v. Givens*, 13 Ky. L. Rep. 491; *Kansas P. R. Co. v. Thacher*, 17 Kan. 92; *Smith v. C., R. I. & P. R. Co.* 56 Iowa, 720. If the attorney is not willing to measure his damages by the terms of the settlement he must allege and prove the original cause of action, because he would be seeking to recover on that cause of action. But where he agrees to measure his damages by the agreement of settlement he is not suing on the original cause of action in tort, but on a new and valid cause of action on contract, in which the original cause of action is of no importance except as affording a sufficient consideration for the contract. It is entirely immaterial whether plaintiff could have sustained his original action or not; it is sufficient that he in good faith commenced suit, asserting a cause of action, and that the defendant agreed to compromise. *Read v. Dupper*, 6 Term, 361; *Ormerod v. Tate*, 1 East, 464; *Elliott v. Leopard M. Co.* 52 Cal. 355; *Kansas P. R. Co. v. Thacher*, 17 Kan. 92; *Smith v. C., R. I. & P. R. Co.* 56 Iowa, 720; *Winslow v. C. I. R. Co.* 71 Iowa, 197; *North Chicago St. R. Co. v. Ackley*, 58 Ill. App. 572; *Pleasants v. Kortrecht*, 5 Heisk. 694.

BARDEEN, J. An inspection of the complaint shows that the plaintiffs are seeking to maintain an independent action against defendant to enforce a lien upon a cause of action supposed to exist in favor of their former client, Harris. Their right, if any they have, to maintain it, is based upon their agreement with their client that they should have one third of the amount recovered or received on a settlement, notice of a lien given defendant, and settlement made without their consent. It is quite clear from the authorities that, in absence of a statute, the plaintiffs would have no lien upon a mere cause of action for unliquidated damages.

In *Kusterer v. Beaver Dam*, 56 Wis. 471, this court said that "a party having a cause of action in its nature not assignable cannot, by an agreement before judgment or verdict thereon, give his attorney any interest therein, or in costs which would be incident to a recovery, which will survive a settlement of the cause of action." In a later case, doubt was expressed whether the attorney would have a lien on a *judgment* in such cases that would prevent the client from settling or discharging it. *Voell v. Kelly*, 64 Wis. 504. It was to meet these conditions and remove the existing doubts that the legislature, in 1891, by ch. 204, now sec. 2591*a*, Stats. 1898, enacted that

"Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the same and give such attorney a lien upon such cause of action as security for his fees in the conduct of such litigation; when such agreement shall be made and notice thereof given to the opposite party or his attorney no settlement or adjustment of such action shall be valid as against the lien so created, provided that such agreement for fees shall be fair and reasonable and that this section shall not be construed as changing the law in respect to champertous contracts."

It will be observed that this section gives the attorney a lien upon *the cause of action*, and provides that no settlement or adjustment of the action shall be valid if notice of such lien shall be given to the opposite party. As between the attorney and the party against whom the cause of action is claimed, the notice creates the lien. The right to acquire the lien is a privilege of which the attorney may avail himself by giving the notice required by the statute. The defendant is a stranger to the contractual relations between the attorney and client, and no right can be acquired against it, under the statute, before the required notice is given. If, before that time, it makes a *bona fide* settlement of the cause

of action with the claimant, there is nothing in existence to which the lien can attach. *Day v. Larsen*, 30 Oreg. 247.

Plaintiffs argue that, between themselves and Harris, they were the owners of one third of the cause of action, and the defendant, having notice of such agreement, was bound to respect that relation, and, having failed to do so, they may ratify the compromise and bring suit in their own names for their share, or repudiate it and proceed in the original action. In the first place, it is not shown that the defendant had any notice that plaintiffs claimed a one-third interest in the cause of action. The notice served merely states that the claimant has given them a lien upon the cause of action as security for their fees. This was undoubtedly sufficient to prevent a settlement of the cause of action so as to defeat their lien, but was not sufficient to charge the defendant with notice of an *assignment* of a specific interest in the cause of action. But, even if that were so, the law does not permit the parceling up of an entire claim or cause of action without the debtor's consent. "The debtor has a right to pay his debt *in solido*, and to refuse to be subjected to suit by several claimants; and no notice of an assignment of a part of a debt, no matter how complete in equity, as between assignor and assignee, can destroy this right of the original debtor, without his consent." *Skobis v. Ferge*, 102 Wis. 122. This doctrine applies with greater force, if possible, when it is sought to split up an unliquidated claim for damages. The statute in question does not authorize any such division, nor is there anything in the proofs that would warrant the conclusion that any such division had been assented to by defendant. Such rights as the plaintiffs have must be based upon the statute itself and their action taken in conformity to its requirements. The right to a lien being given by the statute, it cannot be enlarged beyond its terms. It is admitted that plaintiffs have done all things necessary to charge defend-

ant with notice of their lien, as the statute requires. It is admitted that defendant has made a settlement with their client of the cause of action upon which their lien is founded. What is the result? The statute steps in, and says that "no settlement or adjustment of such action *shall be valid as against the lien so created*, provided that such agreement for fees shall be fair and reasonable." Bear in mind that no fraud, collusion, or undue influence is charged. The case rests upon the bare settlement without the plaintiffs' knowledge. Without the statute, it would not be claimed that plaintiffs would have a cause of action.

In *Howard v. Osceola*, 22 Wis. 454, the lien of an attorney who had performed services and advanced money in an action on a town order in his hands was protected, a judgment of discontinuance was reversed, and he was allowed to proceed in the action and collect his fees. The policy of the rule so laid down is to allow the attorney to prosecute whatever lien he has in the original action. This is in entire harmony with the statute in question. This statute said to the defendant, Any settlement you may make in disregard of the attorney's rights shall not be valid; that is to say, you cannot destroy the cause of action upon which an attorney has a lien of which you have notice. It shall continue to exist notwithstanding such attempted settlement. If the cause of action still exists, the lien still exists. If the cause of action has been compromised, so as to end the action, the lien is gone. Hence the attempt of attorneys to sustain *this* action leads to the incongruity of treating the cause of action as being in existence so far as their lien is concerned, and settled so far as the amount of their recovery is concerned. It is either settled or it is not settled. If plaintiffs desire to treat it as having been adjusted, that ends the controversy. If it has not been legally compromised, then they may proceed in the original action and enforce their claim. Such was the rule adopted

in a similar case in New York. *O'Brien v. Metropolitan St. R. Co.* 27 App. Div. 1. In Georgia the statute provided that "attorneys at law shall have a lien upon suits, judgments, and decrees for money, and no person shall be at liberty to satisfy such suit, judgment, or decree until the lien or claim of the attorney for his fees is fully satisfied," etc. [Code of 1873, § 1989.] In a case where the parties settled a pending suit without the knowledge or consent of the attorney, the latter was permitted to prosecute the suit for the recovery of his fees. *Coleman v. Ryan*, 58 Ga. 132. We may doubt the policy of the law which compels parties to litigate in court for the benefit of their attorneys after they have settled their difficulties, but we did not make the statute, and can only enforce it as written. In Kentucky the statute gives attorneys a lien upon demands for unliquidated damages. In *L. & N. R. Co. v. Givens*, 13 Ky. L. Rep. 491, the attorney was permitted to prosecute the action he had commenced in his client's name, after it had been settled, to recover his fees. No doubt many other cases may be found in the books to the same effect. We have been referred to some cases in Iowa and Kansas holding that the attorney may maintain an independent action in his own name, where there has been a settlement with an attempt to defeat his lien. The statutes of those states are so different from the one under consideration that the adjudications thereunder furnish no precedent for our guidance.

It being considered that the lien cannot exist independent of the cause of action, it follows, as a necessary corollary, that a complaint which sets up an adjustment and settlement of such cause of action furnishes no foundation upon which a judgment for the amount of such lien can rest. There being a specific provision in the statute which preserves the lien in favor of the attorneys in the action commenced, they may yet prosecute it to final judgment on their

own behalf, the same as though no settlement had been made. In so doing, it would be necessary to establish the existence of the original demand with the same certainty as though the injured party were still prosecuting, and the recovery would be based upon the actual injury shown, regardless of the attempted compromise. *Casucci v. A. & K. R. Co.* 65 Hun, 452.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

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106 142
117 *432
117 *433

McCann and others, Respondents, vs. Welch and another, Appellants.

February 8—February 27, 1900.

Equity: Setting aside deed: Adverse possession under written instrument: Good faith: Cotenants: Remaindermen: Limitations: Laches.

1. A court of equity will not entertain an action to set aside a deed after the grantee, founding his claim thereon, has acquired title by adverse possession.
2. Under sec. 4211, Stats. 1898, relating to adverse possession of land under claim of title founded on a written instrument, good faith in making such claim is not essential to render the possession adverse.
3. Under a conveyance to him ostensibly executed by his wife a husband took possession, immediately after the wife's death, of a cultivated farm which she had owned, and five days later the deed was recorded. For more than ten years thereafter, claiming title under the deed, he held complete possession of the land either by personal occupancy or by leasing, and also gave a mortgage thereon, which was recorded. Independently of the deed he was entitled to hold the premises by right of curtesy, and two children of the wife by a former husband were also entitled to possession as tenants in common with him immediately upon the death of their mother, but they never received any share of the rents or rental value of the land. *Held*, that as against such children the possession of the husband was adverse, under sec. 4211, Stats. 1898.

4. In an action, brought nearly fourteen years after the execution of the deed, to set it aside on the ground that the grantor did not have mental capacity to execute it, it appeared that when it was executed the children of the grantor and grantee were all present, all of full age, and all so conducted themselves that the scrivener understood that the conveyance was in accord with their wishes; that one of them, at least, had accepted pecuniary benefit from the mortgaging of the farm by the grantee; that at all times they had reason to anticipate that their father might convey the land for his own benefit, but made no objection until after he had conveyed it to a daughter and she, with knowledge of all this conduct, had subjected herself to contractual burdens which she probably would not have assumed had there been a timely assertion of plaintiffs' claim; and that in the meantime the means of defense had been seriously impaired by death, insanity, and impairment of memory of disinterested witnesses. *Held*, that although the statute (sec. 4221, Stats. 1898) barring the action was not pleaded, and assuming that as to said children the possession of the father was not adverse, yet their delay and its attendant circumstances were such that as to them a court of equity should refuse to entertain the action.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

On January 15, 1885, Mary Welch, wife of the defendant *Patrick Welch*, being *in extremis*, and holding the title to the home farm of 120 acres, a justice of the peace was called, who, in the same room with the defendant *Patrick Welch* and all of the children of the parties, prepared a deed of conveyance from the wife to her husband, *Patrick Welch*, for the expressed consideration of $500. The deed was then taken to the bed, and the wife's mark placed thereon, the pen being in her fingers, and they held by her brother-in-law, who had no interest in the matter. The deed was then witnessed by the brother-in-law and the justice, a certificate of acknowledgment subjoined, and was handed to the defendant *Patrick*. There was some evidence as to the defendant's paying the whole or a part of the consideration for the farm originally, and of the wife's desire, previously expressed, to make some such conveyance. The court found

complete incompetency on the part of the wife,—indeed, substantial unconsciousness of what was being done,—and held that the deed was never executed by her. She died the same night.

The defendant *Patrick Welch*, both for many years before and many years afterwards, resided upon the farm, and five days afterwards, to wit, January 20, 1885, recorded the deed, and every since his wife's death, either by personal occupancy or by leasing, has exercised complete possession, claiming title under the deed. On November 6, 1886, he mortgaged the property, and one of the plaintiffs (*Henry*) received a part or the whole of the proceeds of such mortgage. Again, in September, 1895, he made a further mortgage. Both mortgages were promptly recorded in the register's office. On October 12th, the defendant *Patrick* conveyed said premises to his daughter, *Bridget Halstead*, who was present at the time of the attempted execution of the deed from her mother, and who, in common with her brothers and sisters, had known all about that and subsequent transactions. The consideration of the deed to her was her agreement to pay certain sums of money to others, to support her father in a manner specified as long as he should live, to pay him annually certain sums of money, and to provide for his funeral and a monument.

The wife, Mary Welch, left surviving her six children, the plaintiffs *Maggie McCann* and *Mary Harris* being children by a former husband, and the other plaintiffs, together with *Bridget Halstead*, being children by the defendant *Patrick*. The plaintiffs *McCann* and *Harris* were not present at the time of the execution of the deed, nor are they shown to have had any actual knowledge with reference thereto, or with reference to their father's control over the premises since then, having resided, both before and after their mother's death, at a distance.

The present action was for cancellation of the deed, and

was commenced August 24, 1898. The judgment wholly canceled and set aside the deed from Mary Welch to *Patrick*, and canceled and set aside the deed from *Patrick Welch* to *Bridget Halstead* in so far as the latter purports to convey any greater estate than the life estate of the defendant *Patrick* in four sixths thereof, but made no modification of her contract for his support, etc. From that judgment both defendants appeal.

For the appellants there was a brief by *Bushnell, Watkins & Moses*, and oral argument by *A. R. Bushnell.*

For the respondents the cause was submitted on the brief of *Lowry & Clementson.*

DODGE, J. The findings of the court that Mary Welch was incapable of executing a deed, and that she neither knew nor understood what was being done, and had no knowledge and gave no consent to the delivery of the deed to her husband, are not antagonized by a clear preponderance of the evidence, and must stand, so far as material, as verities in the case. Such findings would support the judgment, unless plaintiffs are precluded from maintaining the action by their conduct or by lapse of time. The answer attempts to raise statutes of limitation, but wholly omits the only statute directly applicable to this action, namely, sec. 4221, Stats. 1898, which imposes a limitation of ten years upon certain equitable actions. It, however, pleads secs. 4211, 4212, and 4215, barring actions for the recovery of real estate after ten years of adverse occupancy under a written instrument. This is not an action for the recovery of real estate, and those sections have no direct application thereto as limitations upon the right to bring it. Adverse possession has, however, an effect other than and additional to mere bar of a possessory action, namely, to transfer at least the practical title and ownership from the former owner to the adverse possessor; and if it appear that this

result has been accomplished, and that the plaintiffs, or any of them, no longer have any practical ownership of or title to the property, they cannot maintain the action, for they have no interest to protect thereby. *Dumont v. Dufore*, 27 Ind. 263, 268; *Nelson v. Jacobs*, 99 Wis. 547.

This brings us to consideration of the question whether there has been adverse possession under a claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, in compliance with sec. 4211, Stats. 1898. In considering the rights of the parties under this section there must be a severance of the plaintiffs, of whom *McCann* and *Harris*, being children of a prior marriage, were entitled to immediate possession as tenants in common with their father upon the death of their mother, January 15, 1885, while the others, being children of the defendant *Patrick* as well, have never yet had any right of possession or of action to recover the same, he being entitled, independently of the deed, to hold the premises by right of curtesy. We shall first examine whether there has been adverse possession under written claim of title as against *McCann* and *Harris*.

The actual and exclusive possession by *Patrick Welch* for more than ten years is not disputed. That such possession commenced upon the death of Mary under the deed ostensibly executed by her, and recorded five days later, and has been held under the same ever since, is established by his own undisputed testimony. The character of possession which will exclude the true title must be such that the owner of that title, if in charge of the property and in the exercise of due diligence, might be apprised thereof. *Kurz v. Miller*, 89 Wis. 426, 433. It cannot be doubted that the possession in this case has been of that character. If *McCann* and *Harris* had been in charge of this property,—a cultivated farm,—and had exercised due diligence, they could not but have known that *Patrick Welch's* possession was an-

tagonistic to their right, although he was a cotenant. They were entitled annually to a share of the rents or rental value of the premises, and never received it. The public records, wherein all ordinarily careful people look to ascertain real-estate rights, have disclosed a deed purporting to give him full title since 1885, and a mortgage executed by him, which was itself an assertion of ownership. These things could not have taken place without coming to the notice of an owner in charge of his interests and exercising ordinary diligence even as against a cotenant.

We conclude, therefore, that all the elements of adverse possession under sec. 4211 exist as against these two plaintiffs, unless, as strenuously insisted by the respondents, the defendant *Patrick Welch* cannot predicate his possession upon the deed from his wife, for the reason that it is not a valid one and that he had knowledge of its imperfections.

This is no more than a contention that one may not acquire title by ten years' adverse possession unless his claim of title under a written instrument is made in good faith,—a proposition which is maintained by some courts, and is supported by some remarks in some of our own cases, but which is no longer open to debate in Wisconsin since the very full and conclusive discussion and decision of it negatively in *Lampman v. Van Alstyne*, 94 Wis. 417. Wherever the Wisconsin doctrine is maintained, no paper writing, purporting upon its face to be executed and to convey the land, has been held insufficient to support a claim of title such as may ripen into complete ownership by possession for the statutory period. A deed void upon its face will suffice (*McMillan v. Wehle*, 55 Wis. 685; *Whittlesey v. Hoppenyan*, 72 Wis. 140); a deed executed by a married woman who has no power to convey (*Sanborn v. French*, 22 N. H. 246; *Perry v. Perry*, 99 N. C. 270); a deed ostensibly by an agent, possessing no authority (*Millen v. Stines*, 81 Ga. 655); or signed by one *non compos mentis* (*Ellington v. Ellington*, 103 N. C.

54); or by one having neither title nor possession (*Webber v. Clarke*, 74 Cal. 11; *Love's Lessee v. Shields*, 3 Yerg. 405); a deed secured by fraud of the grantee (*Oliver v. Pullam*, 24 Fed. Rep. 127).

In the light of such uniform holdings we cannot doubt that the deed in question, published to the world by record, would serve as a support for the claim of title contemplated by sec. 4211, Stats. 1898, even though the grantee's acts in securing the same had been more meretricious than they were. We may say, parenthetically, that from the evidence we incline to the belief that the defendant *Patrick Welch*, relying on the knowledge of conveyancing which the justice of the peace was supposed to have, did in reality believe that this deed had accomplished the transfer of the title to him, although in law he doubtless had no right to so believe, and could not be said to be a *bona fide* holder under it, if that were necessary. The underlying idea of this statute is not reward to the diligent trespasser, but rather of penalty upon the negligent and dormant owner, who allows another for many years to exercise acts of possession over his property. The time necessary to render such occupancy effective under a deed is shortened, not in recognition of a good-faith claim by the occupant, but in recognition of the notice to the owner of the adversary character of that occupancy. More negligent is he who allows another to occupy his premises when he is notified that the occupancy is not accidental or subordinate by the exposure to him of a paper which conveys title if it is what it purports to be. The purpose of the statute is not to benefit him who fraudulently obtains such a conveyance, but to deny the use of the courts to him who negligently sleeps on his rights. The requirement of good faith in the few cases supporting it is in disregard or forgetfulness of the real purpose of statutes of adverse possession. From the foregoing the conclusion is obvious that all of the calls of the statute are satisfied, and that, even if the deeds

in controversy be now canceled, that cannot benefit these two plaintiffs, who are fully barred from recovering the land itself. They therefore should not be permitted to maintain this action.

As to the three other plaintiffs, children of *Patrick* and Mary Welch, the situation is very different, for they have never been in position to bring suit for possession, to which they cannot be entitled till their father's death. Possession by or under the life tenant has been held to be not adverse as to remaindermen. *Barrett v. Stradl*, 73 Wis. 385; *Falck v. Marsh*, 88 Wis. 680. Whether the rule of those cases applies where the person otherwise entitled to hold as life tenant in fact holds under an ostensible deed in fee from the common ancestor, we need not consider, in view of the conclusion we have reached on another question. Although these plaintiffs may have had no right of action for possession, and are not divested of their title by adverse possession of the defendants, they have had the right to bring their present action to cancel the ostensible deed from their mother ever since the moment of its delivery to *Patrick* in January, 1885. Had defendants seen fit to plead sec. 4221, Stats. 1898, no reason is apparent why its bar would not have been absolute. Courts of equity, however, are not dependent on statutes of limitation for their right to deny hearing to those who unduly have slumbered on their rights. This power has been exercised by those courts from the earliest times, with no fixed rule, however, as to the lapse of time necessary or sufficient to exclude a suitor from their forum. Very great lapse of time, if reasonably excused and without apparent hurt to the defendant, has been ignored; and, again, very slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has sufficed. Pomeroy, Eq. Jur. §§ 418, 419, 817; *Badger v. Badger*, 2 Wall. 87; *Sullivan v. P. & K. R. Co.* 94 U. S. 806, 811. Enactment of statutes of express limitation upon distinctively

equitable actions has modified the position of the courts to some extent. In some aspects such statutes absolutely control the court's action, as, where the full statutory term has run and the excuses offered are not those recognized by the statute. In other respects such statutes serve to suggest a general policy, or an analogy to which courts of equity yield voluntary compliance. For example, it is not probable that a court would now consider *mere* lapse of time less than the statutory period sufficient to exclude a suitor if wholly free from any circumstances of negligence or of embarrassment to the defendant. *Ellis v. S. W. L. Co.* 102 Wis. 400, 407. Nevertheless, the proper exercise by a court of equity of its judgment, subject to the limitations above suggested, whether delay with its attendant circumstances is such that a plaintiff ought not to be permitted to invoke its beneficent jurisdiction, is by no means taken away by such statutes. Pomeroy, Eq. Jur. § 419; *Coon v. Seymour*, 71 Wis. 340, 346; *Frederick v. Douglas Co.* 96 Wis. 415; *Cross v. Bowker*, 102 Wis. 497.

In the case before us we have complete supineness on the part of the plaintiffs for more than the statutory period, not in ignorance, but with full knowledge and understanding, of the aggression upon their rights now complained of. That silence and submissiveness commenced with conduct well justifying the belief that they affirmatively acquiesced in the rights asserted by their father. They were all present at the time the deed was drawn and their mother's mark affixed, all of full age, and all so conducted themselves that the justice, Elwell, understood that the conveyance was in accord with the wish of all of them. One, at least, has accepted pecuniary benefit from the mortgaging of this farm by *Patrick* as his absolute property. Meanwhile defendants' means of defense have been seriously impaired. The sister of the deceased Mary, who was her closest and most confidential attendant, is dead. She probably knew more than

any one else of the dying woman's wishes and her ability to understand the transaction. Another nurse (Mrs. Reynolds) has become insane. The other disinterested witnesses (Elwell, the justice, and Daily, the brother-in-law) showed much impairment of memory from the fourteen-years lapse of time and, the latter certainly, from increased age. Very little testimony from such witnesses as these would have sufficed to overcome that of the interested plaintiffs, but their delay has impaired or destroyed it. Further, the plaintiffs have at all times had reason to anticipate that *Patrick* might further dispose of the land for his own benefit, and have preserved silence, dissembling their objections if they had any, until the defendant *Bridget*, with knowledge of all this conduct, has subjected herself to contractual burdens which there is no reason to believe she would have assumed had these plaintiffs asserted their present claims timeously. Such conduct as the foregoing brings these plaintiffs within the reasons which have induced courts of equity to bar their doors to applicants guilty of much less delay. *Cross v. Bowker, supra; Hamilton v. Menominee Falls Q. Co., post*, p. (352); *Smith v. Duncan*, 16 N. J. Eq. 240; *Kline v. Vogel*, 90 Mo. 239, 251; *Brown v. Buena Vista Co.* 95 U. S. 157, 161; 12 Am. & Eng. Ency. of Law, 550, note 2.

Respondents' counsel urges that, because they have seen fit to endure a cloud on it, there is no conclusion that they have abandoned their entire legal title. This might be conceded, and yet a court of equity not be inclined to interpose affirmatively to remove a burden under which they have rested without complaint for a dozen years, when others might suffer. We think these plaintiffs have acquiesced in the *status quo* too long for us now to disturb it at their request, and that the action should not have been entertained as to any of the plaintiffs.

By the Court. — Judgment reversed, and cause remanded with directions to dismiss the complaint.

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111 [1]449

106 152
54 LRA 115n
54 LRA 131n

ADAMS, Administratrix, Appellant, vs. SNOW and others, Respondents.

February 8 — February 27, 1900.

Master and servant: Injury: Proximate cause: Negligence of fellow-servant: Practice: Directing verdict after nonsuit.

1. Plaintiff's intestate, while working for defendants at the bottom of a mine shaft, was struck and fatally injured by a descending ore tub. Upon the evidence — showing, among other things, that the tub was hoisted by a horse led by a boy; that to control its descent it was the boy's duty to unhook the end of the rope from the singletree and hook it to the hame and then to lead the horse toward the mouth of the shaft; that on the occasion in question the horse had escaped from the boy after the rope had been unhooked, and the employee at the top of the shaft started the tub down the shaft without looking to see that the end of the rope was attached to the hame, and was unable to prevent its falling — it is *held* that the proximate cause of the accident was not the incompetency of the boy, if he was in fact incompetent, to manage the horse, nor the insufficiency of the hoisting apparatus, but the negligence of the co-employee at the top of the shaft, and hence that there could be no recovery.
2. It is not error to direct a verdict for defendant immediately after announcing that a nonsuit is granted.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *T. L. Cleary*, *E. C. Fiedler*, and *Orton & Osborn*, and oral argument by *P. A. Orton.*

For the respondents there was a brief by *Spensley & McIlhon*, and oral argument by *Calvert Spensley.*

CASSODAY, C. J. This action was commenced September 4, 1897, to recover damages for an injury to the plaintiff's intestate and husband, sustained May 15, 1896, by reason of the alleged negligence of the defendants, while he was in their employ, and from which injuries he died June 8, 1896.

The defendants answered by way of admissions, denials, and counter allegations. A trial being had, the court, at the close of the plaintiff's testimony, at first granted a nonsuit, and immediately thereafter directed a verdict in favor of the defendants. From the judgment entered thereon the plaintiff brings this appeal.

The evidence in the record is undisputed and to the effect that the defendants were operating a mine and taking out sulphur at the time in question; that the deceased, Frank Adams, was forty-five years of age and an experienced miner, and had worked for the defendants for some time in the mine in question; that the mine was about forty-five feet deep, and the ore was taken therefrom up through a perpendicular shaft or opening; that the manner of so taking ore from the mine was by means of a long rope, with a tub fastened at one end, and passed over or upon two pulleys fastened to a large white-oak tree some six or eight feet above the mouth of the shaft; that the tub, upon being let down the shaft to the bottom, where the deceased was stationed, was filled by him with about 100 pounds of sulphur; that when so filled he would give a signal to Fred Branger, stationed on the surface of the ground at the opening of the shaft; that Fred would thereupon signal the boy, Charles Jackson, who was managing the horse hitched to the other end of the rope, and he would lead the horse along the track extending outward toward the northwest until the tub full of ore from the mine reached the top of the shaft and high enough for Fred to run the tram (a four-wheeled wagon with wheels eight or ten inches in diameter) under it, and then Fred would say "Whoa," and unhook the rope from the tub, and run the tram with the tub upon it out some thirty-two feet from the mouth of the shaft, and empty the ore therefrom, and then return the same on the tram to the mouth of the shaft, and again hook the end of the rope to the tub; that in the meantime it was the duty of the boy, when the

tub reached the top of the shaft and was placed upon the tram, to unhook the end of the rope from the singletree of his horse, and turn the horse around, and then hook the end of the rope in the hame of the horse, and then, after the tub had been emptied and returned to the mouth of the shaft, and the hook fastened to it, as stated, and Fred had dropped the tub in the shaft, to lead the horse toward the mouth of the shaft, so as to hold the tub steady as it passed down to the bottom of the shaft, when it would again be filled by the deceased, and taken up and unloaded, and returned to the mouth of the shaft and let down, as before.

At the time in question it appears that after the tub had reached the top of the shaft and was placed upon the tram and the rope unhooked from it, and after the boy had unhooked the rope from the singletree of the horse, some fifty feet from the mouth of the mine, the horse went off some thirty or forty feet into the brush, and the boy after him; and, before he could get the horse and return him to his end of the rope, Fred, after having said "Look out" to the deceased as usual, dropped the tub down the shaft, with nothing to prevent its falling, except his own unsuccessful efforts when he discovered that the other end of the rope was not attached to the hame of the horse as usual. The tub so let down fell from the top to the bottom of the shaft, and struck the deceased, who unfortunately was under the area of the shaft, instead of being outside as he might have been.

Fred's testimony as to how he came to let down the tub without knowing that the other end of the rope was not attached to the horse's hame is to the effect that he neglected to look and see where the horse was before letting the tub down, as he should have done; that as soon as he found out that the tub had got loose he grabbed the rope with his right hand and held his weight with his left, or he would have gone down the shaft with the tub; that there was no system of signals between him and the boy at the

time; that he would look, so as to know when he dropped the tub, but at that time he neglected to do so; that it occurred by his not looking at that time to see whether the horse was attached to the rope,— by his not seeing to it that the horse was attached to the rope; that the boy had time to perform his work while he was unloading; that there was no system of signals by which he could tell whether the rope was attached to the hame, only by his looking; that he generally looked, not always,— did not at that time; that he could not tell whether the horse and boy were in sight when he let the tub down; that he was facing the shaft all the time, and did not look over that way to see whether the horse and boy were there or not; that if he had looked the accident would not have occurred; that if he had looked it never would have occurred; that he did not look; that he was thirty-one years of age, and had worked for the defendants since the March previous, and at the particular work in question for two or three weeks.

The accident occurred between 10 and 11 o'clock in the forenoon. It manifestly occurred by reason of Fred Branger's negligence, which is frankly admitted. The plaintiff does not claim any right to recover by reason of such negligence, as Fred was at the time the co-employee of the deceased; and there is no claim of negligence in employing him to do such work. Notwithstanding the admitted negligence of such co-employee, yet it is contended that if the injury was in part the result of the negligence of the defendants in employing a boy not quite twelve years of age at the time of the accident, and hence incompetent to manage the horse and unhook the rope from the singletree and attach it to the hame, then that the defendants are liable. Such is undoubtedly the law. This court has held that there is a presumption that a boy of such tender years is incompetent to perform duties involving the personal safety of others. *Molaske v. Ohio C. Co.* 86 Wis. 220. But the evi-

dence seems to indicate that the boy properly performed his duties. The horse was no more liable to start off into the brush than he would have been if a man had been managing him. The boy could not hook the rope to the hame until he got the horse back to the end of the rope. But assuming that a man would have been more vigilant and kept control of the horse, and that the boy was incompetent, yet it is very manifest that such incompetency was not the proximate cause of the injury. On the contrary, it conclusively appears that the proximate cause of the injury was the negligence of Fred, the co-employee of the deceased.

Error is assigned because the court did not submit to the jury the question of the insufficiency of the hoisting apparatus. But it clearly appears that the injury was not the result of any such insufficiency. It was the result of the admitted negligence of a co-employee, as stated. Certainly such negligence was the sole, proximate cause of the injury.

There was no error in directing a verdict for the defendants immediately after announcing that a nonsuit was granted. *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 582.

By the Court.— The judgment of the circuit court is affirmed.

MILLER, Plaintiff in error, vs. THE STATE, Defendant in error.

106	156
108	119
106	156
111	[11]162
106	156
114	[7]203
114	[7]487

February 8 — February 27, 1900.

Criminal law and practice: Murder: Premeditated design: Witnesses: Impeachment: Competency: Husband and wife: Evidence: Immaterial errors: Instructions to jury: Reasonable doubt: Improper remarks of counsel: Court and jury: Dangerous weapon: Manslaughter.

1. In a prosecution for murder, uncontradicted evidence that during a quarrel between the deceased and the defendant the latter was pushed downstairs, and that he immediately went around the

house, procured an ax, returned with it to the second story, and struck the deceased, inflicting a mortal wound, is *held* to show ample time and opportunity for the formation of the premeditated design to kill which is necessary to murder in the first degree.

2. A witness whom it is sought to impeach by showing a statement made out of court contradictory to his evidence must first be asked whether he did not make the statement, fixing with reasonable certainty time, place, and person to whom it is claimed to have been made; and if he does not admit it testimony may afterwards be introduced showing that such statement was made.

3. Where a witness to a homicide had authorized her father to make a statement of the facts for publication, the newspaper article as published was inadmissible as foundation for impeachment, but she should have been asked directly as to her statements made to her father.

4. In a prosecution for murder the wife of the accused is not a competent witness.

5. After giving testimony as to the possibility or probability of temporary irresponsibility on the part of the defendant at the time of the homicide, a medical witness, on being asked whether insanity which suddenly takes place in a man and enables him to inflict a blow sufficient to produce death, and then suddenly disappears, was not known as "convenient insanity," replied that he had never heard that term. *Held*, that, although the question was objectionable, yet, in view of the answer, the error in permitting it to be answered was not prejudicial to the defendant.

6. The refusal of an instruction to the effect that if a witness had intentionally misstated or concealed certain facts the jury were at liberty to disregard *all* her testimony, was not error, such instruction being incorrect without the qualifying clause "unless such testimony was corroborated by other credible evidence."

7. Where a charge to the effect that if the jury found that a witness for the prosecution had been successfully impeached they might disregard her testimony, did not require the jury to find that she had intentionally falsified and did not add the qualifying clause above mentioned, such errors were not prejudicial to defendant.

8. A request by the district attorney that the court instruct the jury, on the subject of reasonable doubt, "that it is not every fanciful or shadowy doubt that a man could conjure up in his mind, but only such reasonable doubt as a reasonable man would have," cannot be successfully assigned as error, it being a request which he had the right to make, and, so far as it went, a correct statement of the law.

9. A failure to define reasonable doubt in the charge is not error where no specific instruction on the subject was asked on behalf of the plaintiff in error.
10. Abusive remarks of the district attorney in his argument to the jury, as to the vicious personal appearance of the defendant, are criticised as likely to call for reversal in a close case, but *held* not prejudicial in this case, in view of the clear evidence of guilt and the absence of any showing that the attention of the trial court was called to them.
11. Although the ax with which a homicide was committed by striking the deceased on the head should have been held, as matter of law, to have been a dangerous weapon within the meaning of sec. 4354, Stats. 1898, defining manslaughter in the third degree, yet to leave that question to the jury was not an error prejudicial to the defendant, where the jury found him guilty of murder in the first degree under instructions to consider and determine the question of premeditated design first, and to consider the question of manslaughter in the third degree only in case they found no such design.

ERROR to review a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff in error was convicted of murder in the first degree in the circuit court for Eau Claire county, and prosecutes this writ of error to reverse that conviction.

The leading facts of the homicide were not greatly in dispute. On the 15th of April, 1898, the defendant, *Christian Miller*, and his wife, occupied rooms on the second floor of a tenement house in the city of Eau Claire. The deceased, Willard Taylor, with his wife and children, occupied rooms in the same house and upon the same floor. There was an entry way eight feet long and four feet wide between the two suites of rooms, and from that entry way the front stairs led to the front door of the house and to the lower floor. There was another suite of rooms on the upper floor of the house, which was not occupied. On the afternoon of the said 15th day of April the deceased, Willard Taylor, was whitewashing an unoccupied room in the southeast corner of said house, and upon the same floor in which he and *Miller*

resided. At about 3 o'clock in the afternoon the defendant, *Miller*, entered the room where the deceased was at work, and accused the deceased of having killed or destroyed some tomato plants which he had been raising in a tin pan on the rear platform of the house. Thereupon a quarrel ensued between the two men, in which *Miller* testifies that Taylor struck him with a hammer, knocking him down, and jumped on him. During this quarrel, both Mrs. Miller and Mrs. Taylor came into the room, and Mrs. Taylor testifies that she saw no hammer. Whatever the fact was with regard to this struggle, the two men were finally separated, and each went to his own apartments.

The defendant, *Miller*, testifies that while he was washing the blood from his head where he had been struck with the hammer the deceased came to his door, and pushed it open, and struck him again with the hammer, and threatened to kill him, and that he (defendant) grabbed the hammer and tried to take it from the deceased, and that they had a struggle in the entry at the head of the front stairs for the possession of the hammer; that Mrs. Taylor grabbed the hammer, and thereupon the deceased took a chair in one hand and the hammer in the other, rushed at the defendant, and pushed or knocked him down the front stairs, and that he thereby received an injury to the base of the spine, and was unable to recall anything that happened afterwards until he found himself in the woods. Mrs. Taylor testifies that *Miller* broke their door in and attacked the deceased with a hammer, and that deceased defended himself with a chair, and got hold of the hammer, and pushed *Miller* out into the hall, and that during this struggle *Miller* fell down the stairs. The undisputed fact is that after *Miller* was pushed down the stairs he went out of the front door of the house and went around the house, procured an ax, and came up the back stairway and through the hall, and the fight was renewed at the head of the front stairs, and *Miller* struck

Taylor with the ax upon the head, inflicting a wound from which he died at 10 o'clock on the same evening.

Miller fled into the woods, according to his own testimony, and remembered nothing of what had occurred until he found himself wandering in the woods. He returned to Eau Claire upon the second day following the homicide, and was arrested at his brother's house, while apparently endeavoring to elude the officers. The defense of insanity was not introduced.

Jos. W. Singleton, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

WINSLOW, J. The killing of the deceased by the plaintiff in error with an ax was admitted in this case, but the contention in the trial court was that the homicide was not murder, because there was not sufficient time for the formation of the "premeditated design to effect death" which is essential to make the crime murder in the first degree.

Upon this question the following instruction was requested and refused, and the refusal is now assigned as error: "The court further instructs you that, though you may be convinced beyond a reasonable doubt that the defendant, at the time he delivered the blow, intended to kill deceased, still, unless you are convinced beyond a reasonable doubt that at the same time the defendant then entertained a premeditated design to effect the death of the deceased, you cannot convict the defendant of murder in the first degree, as a person may intentionally take the life of another and be guilty of manslaughter and of that only."

The court, after reading the statutory definition of murder in the first degree, charged the jury on this subject as follows: "You will note carefully the words 'premeditated design.' While the law requires, in order to constitute murder in the first degree, that the killing shall be wilful, delib-

erate, and premeditated, it does not require that the wilful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is sufficient if there was a design and determination to kill, distinctly framed in the defendant's mind, before he struck the fatal blow which caused the death of Willard Taylor. If you find from the evidence, beyond all reasonable doubt, that the defendant, at any time before striking the blow which caused Taylor's death, had formed in his mind a wilful, deliberate, and premeditated design to take his life, and that such blow was struck in furtherance of such design, without any justifiable cause therefor, as will be hereafter explained, then you should find defendant guilty of murder in the first degree." It will be at once seen that the instruction given by the court is in entire accord with the doctrines laid down by this court in the recent case of *Perugi v. State*, 104 Wis. 230, and that the instruction proposed by the plaintiff in error is just as plainly in conflict with the conclusions reached in that case. The whole subject of intentional killing and premeditated killing is so fully discussed in that case that it is deemed unnecessary to go over it again. It is sufficient to say that the evidence in the case before us shows ample time and opportunity for the formation in the mind of the premeditated design to kill, before the fatal blow was struck; and the circumstances seem to point very persuasively to the conclusion that such design was in fact formed when the plaintiff in error, after the first scuffle, went around the house and procured the ax and returned with it to the second story of the house to renew the conflict. While these considerations dispose of the main question which is presented by the record in the present case, there are a number of minor exceptions which require attention.

1. Mrs. Taylor, the widow of the deceased, was the main witness for the state, and upon her cross-examination she

was asked the question whether some parts of an account of the homicide published in an Eau Claire newspaper on the day after the killing were incorrect; the idea being to subsequently prove that Mrs. Taylor authorized her father to make a different statement of the facts, and that such last statement appeared in the same paper on the following day, and then to introduce this second publication as impeaching the testimony of Mrs. Taylor. An objection to the question was sustained, and very properly sustained. The manner in which the foundation must be laid for impeachment of a witness by showing statements made out of court contradictory to his evidence is well settled. The witness sought to be impeached must first be asked whether he did not make the supposed contradictory statement, fixing with reasonable certainty time, place, and person to whom it is claimed to have been made; and if he does not admit it testimony may be afterwards introduced showing that such statement was made. 3 Jones, Ev. §§ 847, 848. The supposed impeaching statement here, if any, was the one made to her father orally, and not the article printed in the newspaper, because it was not claimed that she made any statement to an employee of the paper; hence the foundation for impeachment should have been laid by direct questions as to her statements made to her father. No attempt was made to do this, and hence there was no error in the ruling complained of.

2. The testimony of the defendant's wife was offered and, on objection, excluded. The ruling was correct, under repeated decisions of this court. *Crawford v. State*, 98 Wis. 623.

3. Although the defense of insanity was not pleaded, the defendant contended that he had no conscious knowledge of his actions after he was thrown downstairs by the deceased, and that he was substantially irresponsible for his acts; and considerable testimony as to the possibility or

probability of such a mental condition was introduced. Dr. Selbach, having given some testimony upon the subject, was asked by the district attorney upon cross-examination this question: "Doctor, insanity which suddenly takes place in a man and enables him to inflict a blow sufficient to produce death, and then suddenly disappears, is what is known as 'convenient insanity,' isn't it?" An objection to this question was overruled, and the witness answered, "I have never heard the term 'convenient insanity.'" While the objection to the question might well have been sustained, still, in view of the nature of the answer, we are unable to see any prejudice to the plaintiff in error in allowing the answer.

4. An instruction was asked by plaintiff in error to the effect that, if Mrs. Taylor had intentionally misstated or concealed the facts as she saw and heard them at the time of the first encounter, then the jury were at liberty to eliminate from consideration *all* of her testimony. This was refused, and the court charged generally that it was claimed that Mrs. Taylor had made statements out of court contradictory to some of her testimony; that the jury were to inquire whether such contradictory statements had been made, whether the witnesses to such statements may not have misunderstood her, and whether the evidence ought to impeach her; that such contradictory statements might be considered as bearing on her credibility; and, if they found that she had been successfully impeached, they might disregard her testimony. There is no error here of which the defendant can complain. The instruction asked was erroneous, because it authorized the jury to disregard *all* of the evidence of the impeached witness, when there should have been added to it the qualifying clause, "unless such testimony was corroborated by other credible evidence." *Bratt v. Swift*, 99 Wis. 579. It seems probable that the instruction given by the court is subject to the same criticism, and to the further criticism that it did not require the jury to find that the wit-

ness had intentionally falsified; but neither of these defects was prejudicial to the defendant, but rather in his favor.

5. The court did not define the term "reasonable doubt" in his charge, and the district attorney, at the close of the court's charge, made the following request: "I ask the court to instruct the jury, on the subject of reasonable doubt, that it is not every fanciful or shadowy doubt that a man could conjure up in his mind, but only such reasonable doubt as a reasonable man would have." To this remark the plaintiff in error objected, and requested the court to give specific instructions on the question of reasonable doubt. The court then said, "I have in my charge a clause on reasonable doubt," and to this ruling of the court and remark of the district attorney exception was taken. Certainly there can be no error successfully predicated upon the request of the district attorney. It was a request which he had a right to make, and was, moreover, a correct statement of the law, so far as it went. Nor was it reversible error to fail to define reasonable doubt when no specific instruction was asked upon the subject. Had the counsel for the plaintiff in error drawn and presented a proper instruction upon the subject, the refusal thereof might or might not have been error, depending upon whether the subject was sufficiently covered in the general charge. *Buel v. State*, 104 Wis. 132. No specific instruction was asked, however; hence there was no error.

6. A number of exceptions were taken to remarks by the district attorney in his closing address to the jury, and these will be considered together. In referring to the defendant, he said he was "as vicious a looking man as any man ever looked on." In reply to a question by defendant's attorney as to whether he meant to say that this was a cold-blooded killing, he said, "It was a cold-blooded killing with a cold-blooded ax, and the man is cold still." He also argued that the defense was convenient insanity, as described by Dr.

Selbach; and in discussing the question whether there was time for premeditation he asked the jurymen to take out their watches and note the space of time which one minute consumes, and some jurymen did so, and, after the watches had been held a minute, he asked, "Is not one minute sufficient time for a man to premeditate the killing of a hundred men?" With reference to each of these matters the record simply states that the defendant's attorney "objected and excepted." It does not appear that any ruling was asked, or made by the court, nor that the attention of the court was directed to the matters objected to. Such, ordinarily, should be the course when error is predicated upon remarks of counsel. It is undoubtedly true that the abuse of counsel's privilege may be so flagrant as to call for reversal, even in the absence of a ruling, but we are not inclined to hold that the matters complained of here constitute such a case. We are far from justifying the district attorney in his abusive remarks as to the vicious personal appearance of the defendant. Such a remark has no proper place in any criminal prosecution, and he should have been sharply reprimanded by the court for making it, if the remark was brought to the court's attention. A defendant is entitled to freedom from mere personal abuse of this nature, and we trust that we shall not be called upon to review a record containing such a departure from common fairness, as well as from professional ethics, in the future. In a case where the evidence of guilt was less clear and convincing, such a remark might well call for a reversal of the conviction; but we do not feel that we would be justified in reversing the present judgment on that ground, especially in view of the absence of any showing that the attention of the court was directed to it. See *Fertig v. State*, 100 Wis. 301.

7. The trial judge submitted to the jury instructions covering three degrees of homicide,— murder in the first degree, murder in the second degree, and manslaughter in the

third degree. He first gave them the statutory definition of murder in the first degree as contained in sec. 4338, Stats. 1898, and gave very careful and full instructions as to premeditated design and the other essential elements of that crime. He then said, "If you do not find defendant guilty of murder in the first degree, I will submit to you whether he is guilty of murder in the second degree." He then defined murder in the second degree, and gave its essential elements, after which he said, "If you do not find defendant guilty of murder in the first or second degree, you may determine whether he is guilty of manslaughter in the third degree." Then followed the statutory definition of manslaughter in the third degree, and instructions as to that crime, as follows: "Sec. 4354, Stats. 1898, reads: 'Any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree.' I will refer to excuse or justification hereafter. You will notice here, also, that the killing is without a design to effect death. In place thereof the words are 'heat of passion' and 'by a dangerous weapon.' (You will consider whether an ax employed as claimed in this case is a dangerous weapon. If you find that the killing was by a dangerous weapon, you should next consider whether it was done in the heat of passion.) You have heard the testimony of Mrs. Taylor as to the fight in the room when defendant and deceased first met. You have also heard the defendant's version of what took place there and until he reached the foot of the front stairway. (If you find from that time until the fatal blow was struck defendant had sufficient time to cool his passion, and that he actually formed a premeditated design to kill deceased, and actually struck the fatal blow in pursuance of that design, then defendant is not guilty of manslaughter in the

third degree, but his crime is murder.) This is a vital question in this case, and you should, early in your deliberations, decide it. *Was there a premeditated design to effect death?* If you conclude there was no such design, then you may say whether the killing was in the heat of passion and with a dangerous weapon; and, if you find these conditions existing, you may find defendant guilty of manslaughter in the third degree."

Exception was taken to that part of the foregoing instruction which submits to the jury the question whether the ax employed in this case was a dangerous weapon, and it is said that it was the duty of the court to hold as matter of law that an ax directed at a vital part was a dangerous weapon. The prejudice which is claimed to have resulted to the defendant from this alleged error is that under this instruction the jury may have found that the blow was struck in the heat of passion, but that the ax was not a dangerous weapon, and that for that reason alone they may have failed to find defendant guilty of manslaughter in the third degree.

It may be admitted that the question as to what is a dangerous weapon is ordinarily a question of law for the court (2 Bish. New Cr. Law, § 680), and that in this case there can be no doubt that an ordinary ax is a dangerous weapon when the blow therewith is directed at the head, and should have been so declared by the court; but the conclusion that the defendant was prejudiced by the failure of the court to so declare does not follow. It is to be presumed that the jury followed the directions of the court. The court directed them to take up the question of murder in the first degree first, and, in substance, told them to consider and settle the question of premeditated design before considering at all the question of manslaughter in the third degree, and that if premeditated design was found the offense was murder, unless justifiable or excusable homicide, and only

in case there was no such design could they find the defendant guilty of manslaughter in the third degree. The jury found the defendant guilty of murder in the first degree, and thereby declared that there was premeditated design to effect death; hence it seems clear that, following the directions of the trial judge, they never could have reached the question of manslaughter in the third degree, and hence the error in submitting the question of the character of the weapon could not have been prejudicial. Under the decisions of this court such an error is held to be favorable to the accused. *Dickerson v. State*, 48 Wis. 288; *Winn v. State*, 82 Wis. 571.

Some minor criticisms of the charge are made, which, however, are manifestly not well taken, and are not deemed of sufficient importance to require treatment in detail. The charge, as a whole, seems to be full and fair, and to have preserved all the legal rights of the defendant.

By the Court.— Judgment affirmed.

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VILAS and others, Appellants, vs. BUNDY and another, Respondents.

December 16, 1899 — March 20, 1900.

(1) *Contracts: Ambiguity: Court and jury.* (2-5) *Attorneys at law: Power of trustee to employ: Employment of assistant: Sharing of earnings by attorneys for joint plaintiffs: Incurring expenses.*

1. Where there is no ambiguity in the language of a contract as applied to the undisputed facts, it is the province of the court to interpret it; but where the subject matter of such contract and the circumstances under which it was made may properly be considered in order to correctly determine the meaning the parties gave to its language, and conflicting inferences may reasonably be drawn from such evidence in regard to such meaning, the proper inference should be determined by a jury, and that is true whether the am-

biguity springs from uncertainty in the literal sense of the words themselves or from the application of plain words to the facts.

2. Persons holding the legal title to one half interest in a judgment in trust for others, coupled with a power to control and collect it and divide the proceeds among those interested therein, impliedly possess power to employ attorneys and use all the usual and ordinary means to carry out the purposes of the trust, and to charge the expenses thereof against the fund recovered.

3. An attorney, at his own expense and risk, may employ an assistant to aid him in his professional work for a client, and charge such client with the reasonable value of the entire labor; and that does not militate against the rule that the relation of attorney and client does not imply authority to the former to employ another attorney at the client's expense.

4. If one of two joint plaintiffs employ two attorneys to act jointly in his behalf in the prosecution of a cause, and the other employ one of such attorneys to act for him, an agreement between the attorneys to put their earnings into a common fund for equal distribution does not militate against the right of either to charge and collect of his client the full reasonable compensation for the professional labor undertaken by him for such client and performed personally and by the aid of his assistant and subordinate.

5. The relation of attorney and client, where the attorney has general authority over the subject of his employment, implies authority to such attorney to incur such expenses in the professional undertaking as are usual and reasonably necessary, under all the circumstances, to carry out the object of the employment.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Affirmed.*

Action of trover to recover damages upon the following facts:

On June 23, 1888, Luther Cain obtained a judgment against the Minneapolis & St. Louis Railway Company for $4,205.28 damages and costs, on a cause of action for a negligent personal injury. Levi M. Vilas, his attorney, performed the necessary services as such, under a contract entitling him to one half the amount finally recovered. Before anything subsequent to the entry of judgment was done, except the

issuance of an execution thereon which was returned unsatisfied, Mr. Vilas died, and the judgment thereafter remained dormant for nearly five years, it being supposed that it was of little or no value because of the fact that a mortgage, supposed to cover all the judgment debtor's property, was foreclosed about the time such judgment was rendered, but without making Cain a party defendant, and such property thereafter, by judicial proceedings, passed into possession and supposed ownership of a new corporation called the Minneapolis & St. Louis Railroad Company. Soon after the death of Mr. Vilas his administrators obtained from Mr. Cain a paper, evidencing the interest of the estate of the deceased in the judgment, which was worded as follows:

"State of Minnesota,
County of Scott. In District Court.

Luther Cain	Judgment, June 23rd, 1888.	
vs.	Damages,	$4,147.
The Minneapolis & St. Louis Railway Company.	Costs,	58.28
		$4,205.28

"For and in consideration of services rendered by the late Levi M. Vilas, deceased, and such as may be rendered in collection of the amount due, by his administrators, I, Luther Cain, the plaintiff in the action above entitled, do hereby sell, assign, and transfer to James W. Lusk, William F. Vilas, and Edward P. Vilas, administrators of the estate of Levi M. Vilas, deceased, all of said judgment for costs and one half the judgment for damages, recovered by me in the district court of Scott county, Minnesota, on the 23rd day of June, 1888, against the Minneapolis & St. Louis Railway Company, being $4,147 damages and $58.28 costs, and do authorize and empower them to proceed to collect the same or so much thereof as may be collectible, to compound, settle, and discharge the said judgment, and the whole thereof, but upon condition that the one-half of all the proceeds ob-

tained or collected over and above the costs shall be paid to me. Hereby ratifying and confirming all which said assignees as my attorneys may do by virtue thereof.

"Dated May 3rd, 1890. Witness my hand and seal.

"LUTHER CAIN. [Seal.]"

In 1894 Mr. Cain wrote to Mr. William F. Vilas, one of the administrators, in regard to the collection of the judgment, but not receiving any reply he employed *John B. Fleming*, one of the defendants, to investigate the matter for him. *Fleming* corresponded with Mr. Vilas for a considerable length of time. Many letters passed between the two in regard to the collection of the judgment. During such correspondence Mr. Vilas was informed by *Mr. Fleming* of all the facts, so far as he could discover the same, regarding the foreclosure of the mortgage and the probabilities of collecting the judgment. On the part of Mr. Vilas many suggestions were made, and *Fleming* was urged to investigate diligently for the purpose of finding property not covered by the foreclosure title. In answer to a letter written by *Fleming*, stating that he had employed *Mr. C. T. Bundy*, one of the defendants, to assist him, Mr. Vilas said that any arrangement made with *Bundy* at the cost of Cain was all right, but indicated that he, Vilas, represented the interest of the estate in the judgment.

The result of the investigation made by defendants was a discovery, as they supposed, of some property of the old railway company not covered by the foreclosure, and they thereupon made due application to the court for the appointment of a receiver in order to secure the application of such property to the payment of the Cain judgment. The petition was in the name of all parties interested in the judgment as plaintiffs, William F. Vilas, E. P. Vilas, and J. W. Lusk, as administrators, being made plaintiffs as representing the interest of the Vilas estate.

When matters reached this stage, Mr. William F. Vilas

was urged to give sufficient personal attention to the matter to consult with the defendants if the two interests were to go along together. Up to this time, while Mr. Vilas had made many suggestions, all the real labor in regard to collecting the judgment had been done, and all the expenses borne, by the defendants. Cain was a very poor man and not able to advance anything even to pay expenses. Defendants understood from the start that compensation for their work, and expenses as well, was wholly contingent upon collecting the judgment in whole or in part. About the time the action was commenced for a receiver, defendants succeeded in obtaining a consultation with Mr. William F. Vilas and Mr. E. P. Vilas, representing the Vilas interest in the judgment. The consultation on the part of the defendants was by *Mr. Bundy*. The petition for a receiver, or a copy of it, and other papers material to the case, were present, some having been previously sent to Mr. W. F. Vilas by mail and the balance having been brought to the interview by *Mr. Bundy*. *Mr. Bundy* made a full statement of all the facts as he understood them and of the proceedings he deemed advisable in order to collect the judgment. Mr. William F. Vilas expressed gratification with the situation and approved of what had been done up to that time. According to his remembrance of what occurred, the consultation was merely that of lawyers representing friendly interests; and that at the close of it he said to *Mr. Bundy*, "I think I can rely upon you." According to *Mr. Bundy's* version, the consultation was carried on by him as one of the attorneys having charge of a professional matter with parties interested, or their authorized agents by whom such attorneys were employed. He testified that at the close of the interview Mr. Vilas said his political duties would prevent his performing any services in the matter, and that he should rely solely on *Mr. Bundy*, the language being, "I represent the Vilas heirs. Their inter-

est is the same as Cain's. I believe you will take care of this case properly and I shall rely wholly on you. I will rely entirely on yourself."

Up to the time of this interview the correspondence had been carried on, on the part of defendants, wholly by *Mr. Fleming*, but thereafter it was wholly by *Mr. Bundy*. Many letters passed between *Mr. Bundy* and Mr. Vilas, the latter being kept posted as to every step in the proceedings till the collection was finally made. During such time the complaint was amended by making the Vilas heirs who were of age parties plaintiff, and those who were under age plaintiffs by a guardian *ad litem*. That was supposed to be necessary, as it was discovered by *Mr. Bundy* that the estate had been fully administered and the property assigned to the heirs. During such time, also, two hostile actions were commenced to foreclose mortgages for the purpose of defeating the efforts of defendants to collect the judgment, and, to the knowledge of Mr. Vilas, defendants or *Mr. Bundy*, as counsel with Flandreau, Squires & Cutcheon as attorneys,—who with the knowledge of Mr. Vilas had been employed as local attorneys,—appeared and obtained injunctional orders restraining proceedings in such actions till the right of plaintiffs to a receiver should be determined. Such right was finally established.

All the professional services, from the start, were performed by defendants, or on their account, and all the expenses were borne by them. Soon after the right to a receiver was established as stated, the claim was collected, $5,000 being paid to the local attorneys, Flandreau, Squires & Cutcheon. They retained $500 for their services and turned $4,500 over to *Mr. Bundy*, which he disbursed by paying $1,182.50 to Fleming, of which $322.50 was for expense of maintaining Cain during the litigation, and $85 for other necessary disbursements. Four hundred and fifty dollars was paid to a brother of defendant *Bundy* for legal as-

sistance. Nine hundred and twenty dollars was retained by *Mr. Bundy*, $145 of which being for necessary disbursements. Nine hundred and seventy-three dollars and seventy-five cents was paid to Mr. Cain and a like amount to Mr. William F. Vilas for the Vilas heirs, it being reported at the same time that $1,250 was charged to the Vilas interest in the judgment for attorneys' fees, including $250 retained by the local attorneys. Mr. Vilas, upon receiving the amount indicated, immediately laid claim to one half of the entire sum collected of the railway company, upon the ground that all costs and expenses of making the collection were chargeable to the Cain interest, and that neither of the defendants had authority to represent the Vilas interest. Defendants refused to accede to such claim, and this action was thereupon brought by plaintiffs to recover damages for the money which they claimed had been unlawfully retained by *Mr. Bundy*.

Defendants joined issue by answer, and on the trial evidence was produced establishing, or tending to establish, all the facts stated in the foregoing. As to the money paid for the maintenance of Cain, the evidence tended to show that defendants supposed that his presence might be vital to their success; that the only way to be certain of having him at hand when needed was to pay his board; that he was a cripple, very poor, and entirely unable to maintain himself; and that *Mr. Fleming* personally incurred the liability for the expense of boarding him as a necessary expense in the case, and that the $322 was paid to *Fleming* on that account. There was evidence also to the effect that the services performed by *Bundy* were reasonably worth $2,500 and the services of *Fleming* $1,000. Plaintiffs, by their attorney, conceded liability for one half of the charges of Flandreau, Squires & Cutcheon, and one half of the other expenses except the expenditure for maintaining Mr. Cain during the litigation. Defendants had a written contract with Cain

securing to them one half of his interest as compensation for their services rendered to him.

The amount claimed by plaintiffs at the close of the evidence was $1,161.25, being one half of the $5,000 less $115 for disbursements, $250 on account of the services of Flandreau, Squires & Cutcheon, and $973.75 received from *Mr. Bundy*.

Numerous instructions were requested by plaintiffs' attorney and refused. The jury, on the evidence and the law as given them by the court, found for the defendants a verdict of no cause of action, and judgment for costs was rendered in their favor accordingly, from which this appeal was taken.

William F. Vilas, for the appellants.

T. F. Frawley, for the respondents.

The following opinion was filed January 9, 1900:

MARSHALL, J. The assignments of error found in the brief of appellants' counsel, made in conformity with the rule on that subject, do not correspond accurately with the divisions made by counsel in the argument that follows. In this opinion we will endeavor to follow closely such argument, instead of the assignments of error, thereby taking up in detail the reasons put forward to support the appeal.

It is first said that no engagement of either defendant as attorney for plaintiffs was proven; that the correspondence between *Fleming* and William F. Vilas indicates clearly that no contract relations were entered into between the parties, and that care was taken to protect the representatives of the Vilas interest in the judgment from any danger of a claim being made by defendants that they were authorized to represent it, by stating in the correspondence that any employment of attorneys to collect the judgment must be at the expense of Cain; that as there was no controversy in regard to what was said between *Mr. Bundy* and Mr. Vilas, it was the duty of the court to say as a matter of law

whether a contract was thereby made, and error to submit the matter to the jury. True, where there is no ambiguity in the language of a contract when applied to undisputed facts, it is the province of the court, only, to interpret it. *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33. It would perhaps be more accurate to say, in the circumstances indicated, that it is the duty of the court to decide whether the language creates contract relations or not, and the nature of such relations; for, strictly speaking, where there is no ambiguity of expression, no dispute about the facts, and no uncertainty of meaning when the language is applied to the facts, there is no use for interpretation or construction. Where there is such use, and it is confined to mere interpretation or construction, the question is undoubtedly one of law for the court alone to deal with; but where, though the literal sense of the language of a contract be plain, it leads to absurd consequences or an unreasonable situation when applied to the facts, so as to render a resort to extrinsic evidence proper in order to determine the real intent of the parties, from which evidence conflicting reasonable inferences may be drawn, then it is proper for a jury to say which is the correct inference, and, under proper instructions, to say what the parties in fact agreed to. It is for the court to say, in such a situation, whether different minds may reasonably differ as to what was in fact intended, and if so, for the jury to say where the truth lies. *Ganson v. Madigan*, 15 Wis. 144; *Prentiss v. Brewer*, 17 Wis. 635; *Rockwell v. Mut. L. Ins. Co.* 21 Wis. 548; Beach, Cont. §§ 743, 744. It follows that if the language used by *Mr. Bundy* and Mr. Vilas when the consultation was had at Madison, the time when it is claimed a definite contract of employment was made, and when it was in fact made if made at all, was ambiguous, and the solution of such ambiguity depended on the circumstances which called the parties together and characterized their transactions, and was not free from reasonable

doubt so far as the pure question of fact was concerned, it was for the jury to say what the parties intended.

In testing the action of the trial court in submitting the case to the jury on the subject of whether contract relations were formed between plaintiffs, or their representatives or trustees, and defendants or *Mr. C. T. Bundy*, within the principle stated, it must not be lost sight of that ambiguity of expression is one thing and ambiguity of meaning is another,—that words may be perfectly plain taken in their literal sense, yet, when applied to the facts, doubt arise as to the sense in which such words were used. Obscurity, which often springs from the consequences of a literal application of the plain, ordinary meaning of words in a contract to the subject matter of it, calls for the light which the settled rules of law shed upon the uncertainty of intention of the contracting parties, the same as when obscurity exists in the language of the contract itself. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. So, if we say that the language used by Mr. Vilas and *Mr. Bundy* is plain and unmistakable, looking at the words used alone, yet if the intent the literal sense of the words indicates be doubtful when such words are applied to all the facts leading up to and characterizing the negotiations between the parties, and the apparent interpretation which both parties gave to their language afterwards, that presents a question for solution by a jury.

Looking at the action of the court in submitting the question above discussed to the jury, assuming that Mr. Vilas possessed authority to bind the plaintiffs or their interest in the Cain judgment, in the light of the evidence it is considered that if error was committed it was in favor of the appellants. *Mr. Bundy* and *Mr. Fleming*, prior to the conversation between the former and Mr. Vilas, under agreement with Cain, performed valuable services to the end that the judgment might be collected. The representatives of

the Vilas interest were under strong moral obligations, at least, to bear the entire expense of the collection. Their claim was originally founded on a contract entitling Cain to one half of the sum collected, clear of all expenses. The legal title to one half of the judgment was assigned to Mr. Vilas and his associates, coupled with a power to control the entire judgment in their discretion, upon condition that Cain should have one halt of any sum collected thereon, of the damages, free from expenses incurred by the trustees. Such trustees, nevertheless, for a time at least, left the entire expense of making the collection to be borne by Cain while they retained control over the judgment, except in so far as, on their theory, they sanctioned Cain's employment of attorneys at his own expense to do the work which, if successful, would necessarily inure to the benefit of the plaintiffs as much as to that of Cain. Doubtful, expensive litigation was in prospect. Mr. Vilas, while assuming to represent the plaintiffs' interest, had not materially aided the efforts of defendants to collect the judgment, or offered to bear any of the expense of such collection, though defendants had labored to that end for some five months. In that situation Mr. Vilas was notified by the defendants that if the two interests in the judgment were to be handled together there should be a consultation and the whole matter fully understood. A letter to that effect was addressed to Mr. E. P. Vilas, one of the administrators of the Vilas estate and a trustee under the Cain assignment, which letter was delivered to Mr. William F. Vilas. This language was used in such letter: "In case it should be arranged for you to proceed with us, we would gladly meet you and lay everything before you at an early day." That was written April 16, 1895. Soon thereafter, pursuant to defendants' suggestions that a consultation should be had, the significant interview between *Mr. Bundy*, on behalf of defendants, and Mr. William F. Vilas and Mr. E. P. Vilas, on behalf of the

plaintiffs, took place, as a result of which Mr. William F. Vilas, on behalf of the plaintiffs, said he would leave the whole matter to *Mr. Bundy* and rely solely on him to conduct future litigation for the collection of the judgment, the exact language — according to the evidence of *Mr. Bundy*, which does not differ materially from the evidence of Mr. Vilas — being: "We own a one-half interest in that judgment. I believe you will take care of this case properly and I will rely entirely on you. I will not be able to give it the attention I would otherwise give it, on account of my political duties. I will rely entirely on yourself." In view of the whole situation it appears quite clear that if Mr. Vilas's language is so free from ambiguity, either in itself or as applied to the undisputed facts, as to leave no question of fact for a jury to determine, it is because it speaks plainly the language of an engagement of *Mr. Bundy* to act as attorney for the Vilas interest in future efforts to collect the judgment. The view of the learned counsel for appellants is that he spoke merely words of commendation, and that the language used should be taken in that sense. The difficulty is that the literal sense of the words used goes much farther than mere commendation, or, to put it more accurately, they are not words of commendation at all, except in so far as they indicate that the work of *Mr. Bundy* and his associate, *Fleming*, so met the approval of Mr. Vilas that he was willing to place the interest he represented unreservedly in *Mr. Bundy's* hands. To say that the language used conveyed the idea that such interest was to be protected equally with Cain's, and have the full benefit of defendants' labor, in consideration of the mere good will and confidence of Mr. Vilas, does not appeal with much force to the common sense of men of average experience in life. It can hardly be doubted that the fair, literal, reasonable meaning of the language under consideration is that Mr. Vilas authorized *Mr. Bundy* to act as attorney for the plaintiffs,

or those controlling their interest in the judgment, in future efforts to collect it; that *Mr. Bundy* accepted the employment tendered to him; and that pecuniary compensation would be made for the services rendered pursuant thereto, at least in case of success in making the collection. If that is not the correct view, then, certainly, applying the language used to the facts, the inferences of fact are not all one way, and the proper inference to be drawn was for the jury to determine.

Much significance is given, in the brief of counsel for appellants, to the testimony of *Mr. Bundy* that he did not expect compensation for his services under the contract with Mr. Vilas except in the event of success in collecting the judgment, it being argued that the only contract claimed is one by mere implication, and that such a claim is too unreasonable to admit of its being based on such a meeting of minds of the alleged contracting parties as to satisfy the essentials of a contract, because the compensation was, according to *Mr. Bundy*, left contingent. To find the existence of a contract to perform legal services for a contingent fee by implication is called the height of absurdity. The infirmity in the argument of counsel at this point is that the contract upon which the recovery appealed from was had was not an implied contract, but was an express contract. If the language used by Mr. Vilas to *Mr. Bundy*, and the latter's assumption of the responsibility of caring for plaintiffs' interest, made a contract at all, there was nothing left by it to implication, but that the services to be rendered by *Mr. Bundy* should be a subject for compensation absolutely or contingently. The fact that *Mr. Bundy* assumed that his compensation would be contingent does not appear to be so passing strange as claimed, since the judgment was considered of doubtful value and attorney's fees from the start had been contingent upon success. When Mr. Levi M. Vilas put the claim into judgment his fees were contingent

upon a final collection of such claim. When Cain assigned one half of the judgment to the two Vilases and Mr. Lusk, the compensation to them or plaintiffs continued in a sense contingent, it being understood that whatever efforts were made by the assignees to collect the claim would be without expense to Cain. That being the situation, it was not unreasonable, as it seems, but very reasonable, that *Mr. Bundy* may have supposed that he was to take his chances of compensation the same as all other parties to the transaction.

A further point is made that Mr. Vilas, being attorney for plaintiffs and guardian for such as were minors, did not possess authority, as such, to bind them, therefore the contract, if one was made, was not plaintiffs' contract. The one sufficient answer to that is that Cain's assignees were the two Vilases and Mr. J. W. Lusk as trustees for plaintiffs. The legal title to a one-half interest in the judgment was transferred to the assignees for the benefit of plaintiffs, with a power in trust of absolute control over the entire judgment. The title of the assigned interest in the judgment did not pass to the two Vilases and Mr. Lusk in their capacity as administrators and representatives of the plaintiffs, and then to the plaintiffs in the general assignment of the Vilas estate at the close of the administration period. The words of the assignment, it will be noted, are, "to William F. Vilas," etc., "administrators," not to them as, or in their capacity as, administrators. According to well-settled rules governing the construction of such instruments, there being no clear indication that the parties described as administrators took in their representative capacity, the word "administrators" is to be regarded merely as descriptive of the persons. *Robbins v. Gillett*, 2 Pin. 439; Randolph, Comm. Paper, § 440. In the assignment under consideration there is nothing to indicate that the assignees took title to an interest in the judgment other than as trustees to retain it till a collection

thereof could be made. The interest conveyed was coupled with a power in trust, evidently not intended to be thereafter separated from such interest,—a power that could only be executed, efficiently, by persons learned in the law. The plain meaning of the instrument was that the three assignees should hold the title to one half of the judgment in trust for the benefit of the plaintiffs, coupled with a power to control the entire judgment for the benefit of all parties interested. When the assignment of the Vilas estate was made to plaintiffs, the title to the Cain judgment did not change. It remained in the assignees under the Cain assignment, with full power to do all things by them deemed proper or necessary to collect the judgment. As such trustees they had ample power to employ attorneys. That cannot be doubted. All trustees possess implied power to use the usual and ordinary means for the conduct of the business intrusted to their charge.

From what has been said it will be seen that ample authority existed for Mr. William F. Vilas, with the consent of his co-trustees (and it should be said in passing that it appears that such co-trustees acquiesced in whatever he did), to employ attorneys to collect or aid in collecting the judgment; and that the ruling of the court, sending to the jury the question of whether a contract was made between Mr. Vilas, on behalf of plaintiffs, and defendants, or one of them, if erroneous at all, was not prejudicial to appellants. So the motion for a general direction of a verdict in appellants' favor was properly denied.

But it is said that plaintiffs were entitled to a verdict for the money paid to R. E. Bundy, $450, in any event, because, if *Mr. C. T. Bundy* was engaged as attorney, such engagement did not carry by implication authority to employ other attorneys at the expense of plaintiffs. That is true. The court so instructed the jury. But it is just as true that an attorney may, at his own expense and risk, employ an as-

sistant to aid him in his professional employment (Weeks, Att'ys, § 246), and the court so instructed the jury.

Complaint is made because the court did not confine defendants' right to compensation to the specific amount left to them after paying the assistant, Robert E. Bundy. At the same time, if the relation of attorney and client existed between defendants or either of them and plaintiffs, the right to compensation for all services rendered by reason of such employment, whether performed by the principals or principal, or their subordinate if there was one, is conceded. The mere form of making up an account is not binding between parties, and, if it were, no account was rendered by defendants or either of them charging a specific sum for their fees or the fees of either of them, and a further fee for services rendered plaintiffs by R. E. Bundy. We find no evidence to that effect. On the contrary it appears that the accounts rendered were to the effect that the charge for attorneys' fees to the Vilas interest under the engagement of *Mr. Bundy* for plaintiffs, was $1,000. The account indicating payment of $450 to R. E. Bundy out of plaintiffs' money was constructed by counsel from information obtained by him in an interview with *Mr. Fleming*. *Mr. Bundy*, who rendered all the accounts to such counsel, claimed from first to last that $1,000 was charged plaintiffs for services rendered under the engagement made by Mr. Vilas of him as their attorney. No claim was made against plaintiffs, or any one representing them, by R. E. Bundy directly or indirectly, and no charge was made against the collected fund on account of any such claim; but there was a claim made by R. E. Bundy against defendants for services performed by him for them, which was paid, not out of plaintiffs' money, but out of defendants' money, if they or either of them were entitled to compensation for professional services rendered in behalf of the Vilas interest in the judgment to an amount equal to their claim of $1,000; and the case was

so submitted to the jury by the trial court. The argument on this branch of the case appears to proceed on the assumption that defendants employed R. E. Bundy for plaintiffs and paid him as plaintiffs' employee or the employee of their trustees. There is no evidence that we can find in the record to sustain that view. The mere fact that R. E. Bundy was paid out of the money collected on the judgment does not sustain it or tend that way, since it is clear that the charge of $1,000 to the Vilas interest was solely for professional services rendered under the engagement made by Mr. Vilas in their behalf, which he who was engaged to perform such services performed personally, or by his subordinate or subordinates. What such subordinate or subordinates did in a legal sense he did, and the case was so submitted to the jury by the trial court.

A further claim is made that money was paid to *Fleming* for legal services out of the funds belonging to the plaintiffs, and that such money should be returned because the evidence shows that if any engagement was made by Mr. Vilas, of an attorney for plaintiffs or in behalf of their interest in the judgment, it was of *C. T. Bundy* only, and that the court erroneously instructed the jury that money paid to *Fleming* could be absorbed by charges for services rendered by *Mr. Bundy* pursuant to his employment. The instructions on this point are as follows: "If the value of the services which were rendered by the defendant *Bundy* after the relation of attorney and client commenced between him and the plaintiffs, upon the theory that you shall find it did so exist, were of a sum equal to that charged independent of the sum paid to *Mr. Fleming* or other attorneys, or of the services rendered by the defendant *Fleming*, then it is immaterial, so far as this action is concerned, whether *Mr. Fleming* was engaged or not or the value of the services rendered by him, so long as no part of such payment came out of the portion of the money properly coming to the

plaintiffs, but was paid out of the amount actually earned by the defendant *Bundy* and to which he was entitled. The sum of $2,000 was charged by the defendants for their services, excluding the sum paid to the St. Paul attorneys, which is not in issue here, Therefore, the question is whether such sum was the reasonable value of the services rendered by *Mr. Bundy* after the time of his alleged employment by the plaintiffs." There are other instructions to the same effect, all of which were duly excepted to. We take it that the court intended to be, and must have been, understood by the jury as expressing this idea: If a contract was made between *Mr. Bundy* and Mr. Vilas, whereby the former alone was employed as attorney for the Vilas interest in the judgment, and the services which he rendered under that contract were reasonably worth $1,000, the full amount charged for attorney's fees against the Vilas interest, exclusive of the charges made by the Minnesota attorneys, it was immaterial to plaintiffs that he put his earnings into a common fund earned in collecting the judgment for division between himself and *Fleming*, for in that case no part of the sum so charged to the Vilas interest could properly be said to have been charged by *Fleming*, and none of plaintiffs' money could be said to have been paid to *Fleming*.

Much harsh criticism of the circuit judge's instructions on this branch of the case was indulged in by appellants' counsel, but after carefully going over the matter we fail to see that it is justified by the record so far as the legal question involved is concerned. If *Mr. Bundy* made a contract with Mr. Vilas, binding upon the plaintiffs or their interest in the Cain judgment, he was entitled to charge against the collected fund the reasonable value of the services rendered pursuant thereto. There can be no doubt about that. The jury were so instructed. If, as between *Bundy* and *Fleming*, the entire amount earned in collecting the judgment was treated as a fund in which they were equally inter-

ested, that does not militate against the right of *Bundy* to charge the Vilas interest with full compensation for his work. That compensation, when received, was his money. The treatment of it by him as a part of a fund for division with *Fleming* did not change the title of any part of it back to plaintiffs. In short, the relations between *Fleming* and *Bundy*, if the latter only was employed for plaintiffs, were entirely immaterial to the latter. They were liable for the reasonable value of the services rendered by *Bundy*, and he had a right to do with his own what he chose to do. If he divided with *Fleming* it was a division of what belonged to him, not to plaintiffs.

The contrary theory advanced by appellants' counsel may be illustrated by the following: If A., of the firm of A., B. & C., be employed by D. professionally, and the three labor together, B. and C. being subordinate to A. in carrying out the object of the employment, A. being the only person having a legal right to compensation therefor, and the person by whose direction and subordinate to whom B. and C. join in performing the professional task, when the contract of employment is ended D.'s liability is limited to the value of the services rendered by A. personally, though the value of the entire service undertaken by him and actually performed by him directly or indirectly be three times that amount; and if the entire value of such service be retained out of money lawfully in A.'s hands, and treated as between himself and associates as a fund for equal division, the money distributed to B. and C. is D.'s money and the three are liable in trover for the conversion thereof. We are unable to sanction that as good law. It is contrary to elementary principles and cannot and ought not "to prevail in a tribunal of justice." We think the jury were plainly told in effect by the trial judge, in the instructions under consideration, that if *Bundy's* labor was reasonably worth the amount retained for professional services, out of the money col-

lected on the Vilas interest in the judgment, and he was the only one employed as attorney for the owners or holders of such interest, and the amount retained was for services rendered pursuant to such employment, it is immaterial to the plaintiffs that the money when obtained was treated as part of a common fund belonging to *Bundy* and *Fleming* and, after paying their subordinate, Robert E. Bundy, it was divided equally between the defendants; and that the instruction was a correct exposition of the law applicable to the facts of this case.

The last point made is that plaintiffs were entitled at least to recover the amount charged to their interest for Cain's board, $161.25, and that the instruction requested to that effect was erroneously refused. If *Mr. Bundy* was employed as attorney for the Vilas interest, and the jury found such was the case, it included power to do those things reasonably necessary, or reasonably supposed by him to be necessary, from a professional standpoint, to carry out the object of such employment. That an attorney may, as incident to professional employment by a client, incur reasonable expenses in conducting the matter under his charge, cannot be doubted. So the only question on this branch of the case, in view of the finding against plaintiffs on the main issue, was whether, under all the circumstances, there was evidence tending to show that defendants were warranted in believing, when the expense of Cain's board was incurred, that it was necessary to a prudent administration of their professional employment to collect the judgment. The idea advanced by appellants' counsel, that the disbursement was improper as to appellants because their attorney, Mr. Vilas, neither authorized nor had notice of Cain's board being an expense in the litigation, is not material to the issue of whether the disbursement was proper as an incident to professional employment. An attorney is never bound to acquaint his client in advance with the necessity of mak-

ing each specific disbursement, and to obtain his sanction of it, in order to be entitled to charge him therefor or to retain it out of the proceeds of the litigation as an expense incident to such attorney's professional employment. By omitting to obtain such authority or sanction the attorney merely takes the chances of the expense being fairly reasonable from his standpoint when it was incurred. Now the evidence is all one way, and from the mouths of both of the defendants, that when they incurred the expense under consideration they believed that prudent conduct in the line of their employment required it; that it was supposed that Cain's presence might be needed at any time; that issues were made up by the pleadings which made it absolutely necessary to have Cain's testimony as a witness in case of the trial that it was expected would occur; that Cain was a very poor man and unable to take care of himself, and that there was no way of being certain of having him at hand when needed except by employing some person to board him; that *Fleming*, in that view, with the concurrence of *Mr. Bundy*, personally incurred liability for the board to a boarding-house keeper; that the sum, $322.50, was paid to him in order that he might discharge such liability, and that the money was actually so used.

The evidence is uncontroverted as to the facts stated. Just how to treat the matter in that situation seems to have troubled the trial judge. The charge was properly deemed of an extraordinary character and not allowable in the absence of peculiar circumstances showing clearly that it was justified thereby. Evidently the judge thought at first that the question, on the evidence, should be disposed of as a matter of law one way or the other. So far as the right to incur the expense as an incident to professional employment was concerned, he said to the jury that the expense should not be allowed unless, when it was incurred, it was clearly necessary. He further indicated that the evidence did not sat-

isfy that requisite by saying that, "upon the evidence in the case, the charge should not be allowed unless plaintiffs were cognizant of the fact that the keeping of Cain was being done as a necessary step in the proceedings to collect the judgment and made no objection thereto." As before indicated, at this point the learned judge evidently supposed that there was no evidence warranting a finding that defendants were justified in regarding the expense of Cain's board clearly necessary to a collection of the judgment when incurred, so he made the right to credit for it turn on whether plaintiffs, or he who should have spoken for them, with opportunity to object to incurring the expense, kept silent and thereby in law consented. There was some evidence to carry the question to the jury on that proposition. *Mr. Bundy* testified that he informed Mr. Vilas that Cain was being kept in aid of collecting the judgment, and no objection was made thereto. Later in the trial, upon the jury coming into court for some explanations, they were directed to find for plaintiffs as to the item of expense for Cain's board. The learned judge seems to have acted at this point upon the theory that there was no evidence to warrant a finding that such expense was allowable as an incident of professional employment, and no evidence to warrant a belief that plaintiffs, or any one authorized to speak for them, knew of the keeping of Cain as an expense of the litigation in time to object thereto. Later the judge seems to have changed to the view that the evidence was all one way in defendants' favor, making a clear case against plaintiffs if they were defeated on the main issue; that if *Mr. Bundy* was employed as attorney for plaintiffs and authorized to act as such, generally, in the collection of the judgment, such employment implied authority to incur the expense of Cain's board, the evidence being uncontroverted that it was probable, when such expense was incurred, that Cain's presence would be necessary to the efforts to collect the judg-

ment being successful, and that such necessity could not be met in any other way than it was met. So he finally instructed the jury, and the instruction was not excepted to, to find generally for plaintiffs or defendants. That took from the jury the issue of whether the expense was a proper charge as an independent matter.

It seems clear that there was evidence admitting of a reasonable conclusion of fact that such expense was proper as a disbursement in the litigation, so the instruction to find for plaintiffs as a matter of law was properly refused. It seems equally clear that the issue of fact of whether such expense was chargeable in part to the Vilas interest, assuming that defendants or *Mr. Bundy* was authorized to represent, professionally, such interest in the litigation, was taken from the jury without objection. We having reached a conclusion that the circuit judge did not err in refusing to take the controversy as to such expense from the jury in appellants' favor, and that there was evidence admitting of a conclusion that such expense was properly incurred by the attorneys as an incident of their professional employment, the whole matter is closed in respondents' favor for the purposes of this appeal, because, as indicated, whether the subject was properly taken from the jury is not before us.

There are some other questions discussed in the brief of appellants' counsel, all of which have received consideration without disclosing any sufficient reason for disturbing the judgment. Such other questions are not deemed of sufficient significance, in view of the conclusions reached on the matters particularly referred to in this opinion, to warrant discussing them in detail.

By the Court.—The judgment of the circuit court is affirmed.

CASSODAY, C. J., and DODGE, J., dissent.

A motion for a rehearing was submitted for the appellants on a brief by *Edward P. Vilas*, of counsel, and *Wm. F. Vilas*, attorney, and for the respondents on a brief by *T. F. Frawley*.

The motion was denied March 20, 1900.

MEDBERRY, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

December 19, 1899 — March 20, 1900.

Railroads: Injury to conductor: Negligence of co-employee: "Operating" train: Statute construed.

Plaintiff, a railway conductor, while standing by the door of a freight car which, in pursuance of his duty, he had caused to be put into his train and drawn up before the freight depot to be unloaded, was struck and injured by a long, heavy bale of felt carelessly and negligently handled by co-employees engaged in unloading the car. It was his duty to see that the door of the car was closed and fastened when the unloading was completed, and to signal the engineer, and he was also watching an open switch connecting with the main line. *Held*, that at the time of the accident he was not engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the meaning of sec. 1816, Stats. 1898, providing that a railway employee so engaged, in the performance of his duty, may recover for injuries caused by the negligence of a co-employee in the discharge of, or in failing to discharge, his duties. DODGE and WINSLOW, JJ., dissent.

APPEAL from an order of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Ingalls & Ingalls*, attorneys, and *J. V. Quarles*, of counsel, and oral argument by *Wallace Ingalls*.

For the respondent there was a brief by *C. B. Sumner*, attorney, and *H. H. Field*, of counsel, and oral argument by *Mr. Field*.

The following opinion was filed January 9, 1900:

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to a complaint for personal injury, alleging, in effect, that the plaintiff at the time of the injury, and for twenty-five years prior thereto, had been in the employment of the defendant as a conductor in charge of a train running between Elkhorn and the village of Eagle; that such train was known as a combination mixed or passenger train, consisting of freight and passenger cars, engine, etc.; that during all of the time of the plaintiff's employment as such conductor it was a part of his regular duty to see to the making up of such train at the terminal points, and to get the same in readiness to leave such points upon scheduled time; that December 23, 1896, the plaintiff, in the regular discharge of his duties as such conductor, was engaged in the making up of his train preparatory to leaving Elkhorn on one of its regular trips; that it became necessary for the plaintiff, in the discharge of his duties as such conductor, to have a certain car, which was to compose and become a part of such train, unloaded at the freight depot at the station at Elkhorn prior to the leaving of the train; that in the performance of such duty as such conductor the plaintiff caused such car to be put into the train and drawn up beside the freight depot at the station at Elkhorn for the purpose of having the freight then in the car unloaded upon the platform; that it was the plaintiff's duty to see that the door of the car was properly closed and fastened after such freight had been unloaded, and to give proper signals to the engineer of the train when such work should be accomplished; that two co-employees of the plaintiff were engaged in taking out the freight in the car, and that the plaintiff, while in the performance of his duty as such conductor, was standing by the side of the car so being unloaded for the purpose of watching an open switch easterly from the train connecting the main lines of the railway with the track upon which the plaintiff's train was standing, and for the purpose

of closing the car door when the freight should be unloaded, and for the purpose of signaling the engineer of the train when the work should be accomplished, and while so engaged the plaintiff was, by the carelessness and negligence of such employees of the defendant engaged in unloading the car, struck by a long, heavy bale of hair felt, which was carelessly and negligently thrown out of the car by the co-employees of the plaintiff engaged in unloading the same; that the injury was occasioned solely by the careless and negligent manner in which the co-employees of the plaintiff handled and manipulated the heavy bale of material, and without fault or negligence on the part of the plaintiff; that by reason of being struck as aforesaid the plaintiff was then and there seriously injured, and became sick and disabled, and that such injury had been progressive and had rendered him permanently disabled.

As indicated, the complaint expressly alleges that the plaintiff was injured solely by being struck by "a long, heavy bale of hair felt" carelessly and negligently thrown by the defendant's employees, who were co-employees of the plaintiff, engaged in unloading a freight car containing such bales. It is well settled that, in the absence of a statute giving the right, there can be no recovery from the master by reason of the sole negligence of such co-employee. *Moseley v. Chamberlain*, 18 Wis. 700, 705, 706; *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668; *Anderson v. M. & St. P. R. Co.* 37 Wis. 321; *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289. The only statute which is claimed to give any such right of action to the plaintiff in the case at bar declares that: "Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part . . . while any such employee is so engaged in *operating*, *running*, riding upon or switching passenger, freight, or other

trains, engines, or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer, or agent of such company in the discharge of, or for failure to discharge, his duties as such." Sec. 1816, Stats. 1898. As the complaint alleges that the plaintiff was free from contributory negligence, he is entitled to recover if the facts alleged bring the case within the provisions of the statute quoted.

That statute has been in force since April 22, 1893, and has repeatedly been before this court for construction. In *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, it was held, in effect, that a car repairer and a yard switchman were fellow-servants, and that the statute did not apply to an injury sustained by a car repairer through the negligence of such yard switchman in causing a car to be kicked against the stationary car in which such repairer was at work. In that case Mr. Justice MARSHALL, speaking for the whole court, said: "The words, 'while engaged in the performance of his duties as such employee,' refer to the words, 'while operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars.' This, we think, is very clear. It is a familiar principle that statutes in derogation of the common law should be strictly construed, and not given any effect beyond the plain legislative intent. . . . The legislative idea of that part of the law under consideration plainly is to give a right of action to the class of employees engaged in operating and moving trains, engines, and cars *while actually so engaged;* and the words used to express such idea are too plain to leave any room for a resort to the rules for judicial construction to determine their meaning." Page 506. In *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, it was held that "a freight handler, while actually engaged in moving a freight car along the track to the freight house in the course of his employment,

was engaged in operating and moving the car, within the meaning of" the statute quoted. In that case *Smith v. C., M. & St. P. R. Co.* was expressly sanctioned, and some of the language quoted above repeated. In *Hibbard v. C., St. P., M. & O. R. Co.* 96 Wis. 443, it was held that "a warehouseman of a railroad company, who was injured, while sealing the doors of a car attached to an engine, through the negligence of an engineer or fireman in suddenly moving the engine, was not employed in 'operating, running, riding upon, or switching' trains or cars, within the meaning of" the statute quoted. In that case Mr. Justice WINSLOW, speaking for the whole court, said: "That the plaintiff was not at the time of his injury engaged in 'operating, running, riding upon, or switching' a car is so plain that argument of the question is unnecessary. Sealing the door of a car plainly is not operating or running it. This view is in harmony with the previous decisions of this court construing this statute."

In the case at bar it became necessary to have the freight car containing the heavy bales of hair felt unloaded at the freight depot at the station in Elkhorn, in order that it could be taken as a part of the train to Eagle. For that purpose the plaintiff caused that car to be put into the train and drawn up to such freight depot. After that car was unloaded, it would have been the duty of the plaintiff, had he not been injured, to see to it that the door of the car was properly closed and fastened, and to have signaled the engineer of the train when the work should be completed. While the plaintiff was standing by the side of the car so being unloaded, watching an open switch easterly from the train, and waiting to so close the door of the car when it should be unloaded, he was struck by the long, heavy bale of hair felt, and injured. In our judgment, the plaintiff was not, at the time of his injury, engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the

meaning of the statute quoted, as construed by this court. It is unnecessary to consider what has been decided by other courts under different statutes.

By the Court.— The order of the circuit court is affirmed.

DODGE, J. I find myself unable to concur in the decision reached by the court, which seems to me to very materially emasculate the statute (sec. 1816, Stats. 1898), and to thwart the purpose of the legislature in enacting the same. The ancient doctrine excusing the employer from liability for an injury to an employee occasioned by negligence of a co-employee grew up at a time when the employees of the same master were few in number and closely connected in their employment, and when, therefore, the opportunity of the employee to know as to the characteristics for caution, intelligence, etc., of his co-employee, and to guard himself against any lapses therein, were much better than those of the employer. The extension of that doctrine to the greatly modified industrial relations of the present day has carried it far beyond the reasons which led to its original adoption, until in modern times it has been applied to men ordinarily having no contact with each other, no opportunity to observe each other, indeed no knowledge of the existence or employment one of the other. This strain on the doctrine has perhaps been stronger in the case of railroad employees than any others. The conductor or the engineer residing at one end of a hundred miles of railroad has no opportunity to know of the qualifications of the switch-tenders, flagmen, track-layers, section-men, or station agents who may from time to time be scattered by his employer along that stretch of track. The stress of haste and expedition resting upon them precludes them from taking precautions against acts of negligence of these various other employees along the route, and almost, if not entirely, negatives the existence of the reasons which led to the adoption of the co-employee doctrine originally.

Legislatures of many of the states have recognized the inapplicability of this doctrine to certain modern situations, and to those of railroad employees more than others. After several experiments in this and other states, sec. 1816 was adopted in 1893 as an attempt to legislatively define those whose duties were of such a character as to make the application of the co-employee doctrine improper. The statute, doubtless, was not perfect, and there may well be other instances as much entitled to legislative regard as those to which the statute is addressed; but to the extent to which it went it was positive and left to the courts nothing of policy but merely ascertainment of the facts. It created a class of employees whom it declared exempt from the application of this doctrine, and described that class as employees "engaged in operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, while engaged in the performance of his duty as such employee." In the first case which arose — *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, 506,— this construction was declared, and the company was held not liable to an employee injured by reason of the running of engines and cars, because he was not in that class, he being a mere car repairer, engaged in making some repairs upon a car standing in the yard; he was not an "employee engaged in running or operating trains or cars." A similar holding was made in *Hibbard v. C., St. P., M. & O. R. Co.* 96 Wis. 443, as to a yard employee who was sealing the door of a car standing on the track, although he, too, was injured by reason of the moving of an engine.

These decisions were clearly in accord with the statute, for these men were not in the class of employees exempted by the legislature from the co-employee doctrine. Certain employees, however, must have been in the minds of the legislators as coming within the language of the statute, and most surely there must have been included the train crew, namely,

the engineer, the fireman, the conductor, and the brakemen. These employees are, by the statute, exempted from peril from negligence of any others "*while engaged in the performance of their duties as such employees.*" Can it be doubted that a brakeman is in the class so exempted because he may be repairing or fastening a door of a car while the train is in the course of its trip? Is he not then in the performance of his duty as such employee, to wit, as a brakeman? If not, what kind of an employee is he? Has he become a car repairer or a yard man? Shall a fireman, while in the midst of his run, although the engine be for a moment stationary, be held not engaged in the performance of his duty *as such employee* while oiling the engine or tightening a nut upon it, because, forsooth, a mechanic in the shop would not be within the statute if he were doing the same thing? It is a safe inference that this class was selected because its members are obliged to do many of the things which at times are done by other employees, under circumstances which subject them to greater peril. A part of the duty of the conductor and of the brakeman while operating their train is the giving of signals to the engineer and throwing of switches, to accomplish which the crossing of tracks and the exposure of themselves to perils thereby are absolutely necessary, and under such haste as to exclude them from the precautions that might be exercised by yard men in doing the same things. To my mind, a conductor does not cease to be such employee the moment his train stops, nor is he any the less operating it when standing on the platform to signal the engineer than when sitting in the caboose between stations. The situation presented by this case illustrates the propriety of our statute. The conductor's duty of expedition required his presence in such proximity to the car door that he might close it without delay, and his duty to care for his train by watching the open switch required a division of his attention, so that he could not exercise the precautions

which might have been available to an employee of a different class, not burdened with the duty of operating the train. The Iowa statute has been so construed as to give right of recovery under circumstances here presented. *Akeson v. C., B. & Q. R. Co.* 106 Iowa, 54. That statute, while differing from our own, resembles it in some respects, and was much considered in formulating ours. I think decisions upon it are worthy of consideration.

To summarize my views: I think a conductor is one of the class of employees engaged in operating trains, etc.; that while standing beside his train to close a car door and signal the engineer he is "engaged in the performance of his duties as such employee," to wit, as a conductor, and also that he is engaged in operating his train; and therefore may recover for injuries caused by negligence of a co-employee. The rule of strict construction invoked by my brethren does not justify the court in repudiating the clear intent of legislation. That seems to me the result of the decision in this case.

WINSLOW, J. I concur in the foregoing opinion by Mr. Justice DODGE.

A motion for a rehearing was submitted for the appellant on the brief of *Ingalls & Ingalls.*

The motion was denied March 20, 1900.

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KERSTEN, Respondent, vs. THE CITY OF MILWAUKEE, imp., Appellant.

January 9 — March 20, 1900.

Municipal corporations: Street improvements: Milwaukee city charter: Grading without petition: Arbitrary assessment of benefits: Remedies: Reassessment: Double payment: Equity: Restoration to original condition.

1. An assessment of benefits to abutting lots from the grading and paving of an alley charged each lot with as many dollars as it had feet of frontage, and the aggregate very closely approximated the total cost of the work. Opposite some of the lots a deep cut was necessary, and opposite others much filling, but no damages were awarded in any instance. *Held*, as found by the trial court, that the assessment was an arbitrary one, based solely upon the cost of the work, and was therefore illegal and void.
2. Under sec. 6, subch. VII, of the charter of Milwaukee (ch. 184, Laws of 1874, as amended), an alley may be graded without a petition from abutting owners, if the council follows the technical course of procedure therein mapped out.
3. Where an assessment for street improvements is arbitrary and fraudulent, the remedy by appeal to the circuit court provided by sec. 11, subch. VII, of said charter, is not exclusive, but the person aggrieved may resort to a court of equity. *Harrison v. Milwaukee*, 49 Wis. 247, and other cases, followed.
4. Where, in an action to set aside a special assessment for street improvements, the assessment is held invalid by reason of defects in the assessment of benefits and damages, it is the duty of the court under sec. 1210*e*, Stats. 1898, to stay proceedings so far as relates to the assessment of benefits and damages, order a reassessment, and make the payment of the amount finally determined a condition of judgment; and the fact that plaintiff also sought relief for an invasion of his premises by reason of the improvement need not interfere with a complete application of the statute to the situation.
5. If, upon the making of such reassessment, it is made to appear that the former assessment has been paid, the court will take that into consideration and not require a double payment.
6. Where the initial steps necessary to give the city the right to improve an alley had been taken, but subsequent proceedings were

void because of defects in the assessment of benefits and damages, a court of equity should not, after the completion of the work, require a restoration of the alley to its original condition without a showing that such relief would be equitable to other abutting owners.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This action was brought by the plaintiff to restrain the city of *Milwaukee* and its contractors from grading an alley at the rear of his lot in Muskego Avenue Heights, in the Eleventh ward of the city, said lot being described as lot 15 of block 1, and having a frontage on the alley of 28.23 feet. The alley runs south from Burnham street to a point about 110 feet from the south line of the block, and then turns west, and opens into Eighteenth avenue. A profile of the alley shows that before it was improved the surface of the ground was very irregular, there being hills and depressions to such an extent as to render it impassable. Towards the north end was a hill, and near the turn where plaintiff's lot was situated there was a depression requiring a fill of several feet.

The grade of the alley was duly fixed and established by an ordinance of the common council on June 8, 1896. On August 3, 1896, the board of public works recommended to the council that this alley be graded and paved from a point 235 feet south of the south line of Burnham street to its western terminus on Eighteenth avenue, and made the proper estimate of cost. On the same day a resolution was introduced in the council, which recited that it was necessary for the public interests to grade and pave this alley, for the reason that it was "inadequate, inconvenient, and unsafe for the public use thereof, for the passage of foot passengers and vehicles, and for the drainage of water therefrom," and that it was necessary to cause said work to be done without a petition therefor from the owners of the property fronting

thereon for the reason that they had negligently failed to make said alley "in a safe and suitable condition for public use, and had negligently failed to present to this common council a lawful petition therefor," and the board was authorized to have the work done in accordance with their recommendation. The resolution was countersigned by the city comptroller, and referred to a committee on August 3d, who recommended its adoption. It was again referred to a special committee on August 17th, who likewise recommended its adoption, and was duly adopted by the council at a meeting held on August 31, 1896. No petition for the work was ever presented to the council.

After the adoption of this resolution, the board of public works made an assessment of benefits against the adjoining lots, which the court finds was arbitrary and fraudulent, for the reason that the board did not consider the benefit to the owners of adjoining property, and did not consider, with reference to the lots, the injury which might result to the owners by reason of said work, but made an arbitrary assessment, based solely upon the cost of the work in front of or abutting upon said lots, respectively, at the uniform rate of one dollar per foot front. Bids were duly called for, and on June 11, 1897, the board entered into a contract for doing the work with the defendants Riemer and Miller. On the following day the contractors commenced their work. This action was commenced, and an injunction sought, which was denied by the court. During the pendency of the suit the work proceeded, and earth was filled in at the rear of plaintiff's lot from four to six feet deep. In doing the work the contractors placed earth, which extended upon the plaintiff's lot, for the lateral support of the embankment in the alley, from eleven inches to thirteen feet. A fence at the rear of the lot was broken down, and access to a water-closet at the rear end of the lot was obstructed. The court found that the plaintiff's prop-

erty had been damaged to the extent of $500, and that he had sustained no benefits therefrom; that all of the lots on the east side of the alley running north and south were similarly affected and encroached upon, and no damages in any instance had been awarded. The maps and profiles in evidence show quite a large hill at the north end of the proposed improvement and lesser hills and depressions along the line of the alley, so that along some of the lots there would be a cut of considerable depth, and others a fill of several feet.

The court found as conclusions of law that the assessment of benefits made by the board of public works was in violation of the charter of the city, a fraud upon plaintiff, and consequently void; that the work done was performed without lawful authority, and created an obstruction in the alley, and was a nuisance; that the taking of plaintiff's property for the purpose of grading the alley was without lawful authority, and constituted a continuing trespass.

A judgment for plaintiff was entered in substance as follows: (1) That the city and its contractors and servants be perpetually enjoined from filling, paving, or otherwise obstructing the alley under the resolution of the council or assessment of benefits mentioned. (2) That the same parties be perpetually enjoined from depositing earth or other materials upon plaintiff's lot, or otherwise encroaching thereon. (3) That the city and its contractors be required to restore said alley for its entire length covered by the resolution for grading, "to its original grade and condition as the same was immediately prior to the grading, filling, and paving thereof," by removing therefrom the earth, etc., deposited thereon in doing such work. (4) That the city and its contractors be required to restore the plaintiff's premises to the original condition they were in prior to said work. (5) That the city be restrained from issuing any certificates to the contractors by reason of the assessment of benefits

made by the board herein referred to. (6) That the plaintiff recover costs.

Due exceptions to the findings were filed, and the city appeals from those portions of the judgment herein numbered 1 and 3.

For the appellant there was a brief by *Carl Runge* and *A. B. May*, and oral argument by *Mr. May*.

Edgar L. Wood, for the respondent.

The following opinion was filed February 2, 1900:

BARDEEN, J. The court has found that the assessment made by the board of public works was arbitrary and based solely upon the cost of the work in front of the abutting lots. A similar assessment was before this court for review in the case of *Liebermann v. Milwaukee*, 89 Wis. 336. The facts are not the same, but the form of the assessment in that case varies in no material respect from the one under consideration. There it was said that the assessment was void on its face for a failure to show affirmatively that it was made in conformity with the requirement of the charter. But we are not to dispose of this assessment by what alone appears upon the face of the proceedings, as in *Hennessy v. Douglas Co.* 99 Wis. 129. With the accompanying facts and circumstances, it shows quite conclusively that the board could not have exercised their judgment in arriving at a result. That this assessment of benefits to each of the adjoining lots should correspond in each case to as many dollars as the abutting lot had feet of frontage, and that the aggregate of benefits should very closely approximate the total cost of the work, are circumstances too significant not to arouse suspicion. Especially is this so when it is shown that opposite some of the lots there was a deep cut and others a deep fill. It is not enough for the board to *say* that they viewed the premises and exercised their judgment, if the *facts* negative that assertion. Here the *facts* cry out so

loudly against the conclusion reached that we find no difficulty in agreeing with the court's estimate of the board's procedure. *Hayes v. Douglas Co.* 92 Wis. 429.

But we cannot, by any means, agree with the court's judgment. It seems to be conceded that the city has, under its charter, ample power to establish the grade of alleys, and that it did, on May 27, 1896, duly adopt and pass an ordinance fixing and establishing the grade of the alley in question. This was the initial step, without which any attempt to improve the alley would have been without foundation. In following out the line of procedure indicated by sec. 6 of subch. VII of the charter [ch. 184, Laws 1874, as amended], the board of public works made the proper estimate of the cost of the work proposed to be done, and made the usual recommendation to the council. Thereupon a resolution was introduced in the council, which declared that it was necessary to grade and pave such portion of this alley, for the reason that it was inadequate, inconvenient, and unsafe for public use and for the drainage of water therefrom; and that it was necessary to cause said work to be done without a petition from the abutting owners, for the reason that such owners had failed to make the alley in a suitable condition for public use. This resolution was first referred to the local committee of the Eleventh ward,— being the ward where the alley was located,— who recommended that it be adopted. It was then referred to a special committee of five members, no one of whom was a resident of said ward, who likewise reported recommending its adoption. The resolution was presented to the council August 3d, and passed and adopted by the council on August 31st by a vote of thirty-nine members in the affirmative. This was, as we regard it, a proper compliance with the charter requirements. *Boyd v. Milwaukee*, 92 Wis. 456. The contention that sec. 6 does not permit the improvement of an alley without a petition from abutting lotowners is altogether too technical to re-

ceive approval. A fair construction of the rather indefinite provisions of that section has led us to the conclusion that such grading may be done without petition, when the council follow, as they did in this case, the technical course of procedure therein mapped out. The initial steps leading up to the improvement of this alley having been taken in conformity to the charter requirements, the city was invested with jurisdiction to proceed. The next step — the assessment of benefits and damages — was, as we have seen, wrongfully taken, and rendered subsequent action void. Sec. 11, subch. VII, provides that the owner of any lot who feels himself aggrieved by any assessment may appeal to the circuit court and have his grievance therein determined; and it is urged that this gives him an ample and exclusive remedy. In cases where the initial steps have been such as to give the city jurisdiction to proceed, this argument appeals to us with considerable force; but this court having held in a long line of decisions that the remedy by appeal is not exclusive where the assessment is shown to be arbitrary and fraudulent, we feel compelled to follow them. *Harrison v. Milwaukee*, 49 Wis. 247; *Watkins v. Milwaukee*, 52 Wis. 98; *Liebermann v. Milwaukee*, 89 Wis. 336.

Admitting that plaintiff may maintain a standing in a court of equity, the trial court should have considered and applied a very important and salutary provision of law, apparently enacted to cover just such cases as this. We refer to sec. 1210*e*, Stats. 1898. This section provides that in actions of this kind, if the court shall determine that such an assessment is invalid by reason of a defective assessment of benefits and damages, it shall stay proceedings in such action until a new assessment therefor be made, and thereupon the proper city authorities shall proceed to make a new assessment, as is required by law in the case of such original assessment. It also gives the plaintiff the right to contest such new assessment, and points out the method of procedure.

When the proper assessment is finally determined, the court shall make an order requiring the plaintiff to pay the same as a condition of judgment. The fact that the plaintiff seeks relief for the invasion of his premises need not interfere with the complete application of this statute to the situation. It being found that the city has the right to grade the alley, a court of equity may readily adjust and fix the rights of the parties as to the matters not connected with the reassessment, and give the appropriate relief, and still obey the statute in regard to the procedure for reassessment.

Independent of this statute, we cannot quite understand how a court of equity could have felt warranted in requiring the defendants to restore the alley to its original condition. The intrusion upon plaintiff's lot by the city and its contractors was wholly unwarranted, as they have admitted by not appealing from that portion of the judgment requiring them to restore his premises to their original condition. The only other matter concerning which the plaintiff has any right to complain is that a proper assessment of benefits has not been made. Other people besides plaintiff have rights in this alley, and, before the court should have required a restoration to the original condition, some proof as to the situation should have been taken. It is fairly inferable from the case that the original condition was unsafe and dangerous. Suppose it was shown that all the other owners had acquiesced in the change, and had paid their assessment of benefits, would a court of equity be warranted in making a judgment which seriously interfered with their rights and did not benefit the plaintiff? A mere statement of the query would seem to furnish an answer to it. The judgment in this regard was wholly unwarranted under any view of the case.

We summarize our conclusions as follows: That the city has the power to and has properly established the grade of this alley; that the action of the council in directing the

grading and paving of the alley, under the proofs offered, was proper and legal; that the assessment made by the board of public works was arbitrary and illegal; that the situation presented is such that the court should order a stay of proceedings in so far as relates to the assessment of damages and benefits for the improvement of the alley, and direct a reassessment and proceedings under sec. 1210*e*, Stats. 1898. To this end, those portions of the judgment appealed from are reversed, with costs, and the cause is remanded for further proceedings in accordance with this opinion.

By the Court.— So ordered.

The respondent moved for a rehearing, and the following opinion was filed March 20, 1900:

BARDEEN, J. The principal ground relied upon in the motion for a rehearing is that plaintiff has already paid the benefits assessed against his property pending this litigation, and that if a new assessment is made he will have to pay twice. There is nothing in the record showing that any such payment has been made. If such should prove to be the fact, when a new assessment is made the trial court would necessarily take it into consideration and adjust the rights of plaintiff accordingly. It is purely a matter of administration in the court below, and can in no way be appealed to, to defeat the plain mandate of the statute which requires a reassessment. This action is virtually one to set aside a void assessment. The city had an absolute right to proceed if it had done so according to law. It being shown that it did not do so, the statute leaves but one course open to the court and that is to order a reassessment as the charter requires, and that is the only relief that can or should be granted in this action. When such reassessment is made, if it is made to appear to the court that plaintiff has made payment to the city of any sum to apply on the former assess-

ment, it will be its plain duty to take that into consideration and not require a double payment.

By the Court.—Rehearing denied with $25 costs.

MCCORMICK and another, Appellants, vs. RYAN and another, Respondents.

February 27 — March 20, 1900.

Executions: Limitations: Judgments transcripted from justices' courts.

Sec. 2968, Stats. 1898 (providing that execution shall not be issued upon any judgment after twenty years from its rendition), and sec. 2900 (providing that execution on a judgment transcripted from justice's court shall not issue after the period of the lien thereof on real estate, viz. ten years from the date of rendition) are not in conflict and both must be enforced.

APPEAL from a judgment of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Upon an affidavit complying with sec. 2968, Stats. 1898, showing the whole amount to be unsatisfied, the circuit court, on October 20, 1898, refused leave for execution upon a judgment of a justice of the peace dated January 19, 1881, and duly transcripted and docketed to the circuit court. From such order the plaintiffs appeal.

For the appellants there were briefs by *Bushnell, Watkins & Moses*, and oral argument by *A. R. Bushnell.*

For the respondents the cause was submitted on the brief of *Edwin T. Morrison.*

DODGE, J. Sec. 2968, Stats. 1898, contains the provision: "In no case shall an execution be issued or any proceedings had upon any judgment after twenty years from the time of the rendition thereof." Sec. 2900, regulating the docket-

ing of judgments upon transcripts from justices of the peace, provides: "No action can be brought upon the same as a judgment of such [circuit] court, nor execution issued thereon, after the expiration of the period of the lien thereof on real estate provided by section 2902;" viz. ten years from the date of rendition. Appellants' contention is that because sec. 2968 does not prohibit issue of execution until twenty years, therefore there is conflict between the two sections above referred to, and sec. 2968 should control. The vice in this argument is that no conflict exists. It is entirely consistent with the prohibition of sec. 2968 against issuing execution on *any* judgment after twenty years to provide by sec. 2900 that none shall issue after ten years on judgments transcripted from justice's court. Sec. 2900 does not take away any right or privilege granted or assured by sec. 2968. That statute is negative, and prohibits rights after twenty years, but does not confer any during that period. The two statutes can perfectly well stand and be enforced together according to their exact words, and therefore they must be. *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513.

By the Court.—Judgment affirmed.

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MILLER, Respondent, vs. CRAWFORD COUNTY, Appellant.
WING, Respondent, vs. CRAWFORD COUNTY, Appellant.

February 27—March 20, 1900.

Counties: Claims: Statement: Disallowance: Appeal: Fish and game wardens.

1. On an appeal from a county board's disallowance of a claim the county cannot be forced to accept and treat as the original statement of the claim what purports to be a copy thereof and is so designated in the notice of appeal, without proof of loss or destruction of the original and that the alleged copy is a true copy.

2. An account for services as local fish and game warden, containing numerous items consisting merely of dates and the names of places, without description of the nature of the services charged for, is not such a statement of the claim as is required by sec. 677, Stats. 1898.
3. Sec. 677, Stats. 1898, providing for the making and filing of written statements as therein prescribed of claims against counties, and that "no such claim . . . shall be acted upon or considered by any county board unless such statement shall have been so made and filed," is mandatory and must be substantially complied with.
4. If the statement of a claim against a county as filed is not in substantial compliance with said sec. 677, it is insufficient as a complaint in the circuit court upon an appeal from the disallowance of the claim.
5. Although the record of the proceedings of the county board states that a claim was "disallowed" for the reason that it was not properly itemized, yet, it being obvious that the board did not pass upon the merits of the claim but merely suspended action until it should be properly itemized, there was no disallowance from which an appeal could be taken.
6. Whether, where no fund has been set apart by the county board for the purpose of enforcing the fish and game law, from which, under sec. 1498*d*, Stats. 1898, deputy wardens might be paid, the state fish and game warden had power, by appointing deputy wardens pursuant to sec. 1498*b*, to force an indebtedness or liability against the county, is doubted but not decided.

APPEALS from judgments of the circuit court for Crawford county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

O. B. Thomas, for the appellant.

For the respondents there were briefs by *L. H. Bancroft*, *G. L. Miller*, and *A. H. Long*, and oral argument by *Mr. Bancroft.*

CASSODAY, C. J. These two cases are substantially alike, and hence are disposed of together.

In the first case the defendant county appeals from a judgment based upon a verdict for $153 in favor of the plaintiff *Miller*. That case got into the circuit court by virtue of a notice of appeal given by *Charles W. Miller*, December 29, 1898, to the county clerk, stating therein that he thereby

appealed from the decision of the county board of supervisors of the defendant county, disallowing his claim against the county, "a copy of which claim" was thereunto attached and thereby made a part of such notice, so disallowed November 22, 1898, said claim being for work and labor performed for the defendant by him as deputy fish and game warden in and for the defendant, in the destruction of seines and nets, and otherwise protecting the fishing grounds and fish and game within that county, and performing the general duties of such wardens, at the instance and request and in behalf of the defendant, and for which the defendant was liable, the work and labor being necessary and proper and for the interests and benefit of the county, all of which was fully set forth in the account thereto attached; that the services were rendered from June 21, 1898, to November 3, 1898, and were in the aggregate $153; that the board wholly disallowed said claim and from such disallowance *Miller* appealed. Attached to such notice of appeal is a copy of the account referred to therein, which purports to be for 102 days' services as local fish and game warden at $1.50 per day, and contains 102 items,[1] and in the case of some of

[1] The copy of the account was in the following form:

"Crawford County.

To Charles W. Miller, Dr.

"For 102 days' services as local fish and game warden at $1.50 $153.00

"Itemized Statement.

"1 June 21, with G. L. Miller, Tilmont lake, Black slough, Folsom bay.

"2 June 22, McGregor lake, Baldwin slough.

"3 June 23, McGregor lake, Baldwin slough, Sunfish S.

. . . . . .

"9 June 30, up Black S., Tilmont, Roseau L.

"10 July 1, in islands, hunters shooting quail.

"11, 12 July 2 and 3, camped at Tilmont L., Big lake, Black slough, Curville S.

. . . . . .

these items two, three, or four items are put together opposite as many different dates, naming one or more places. At one place there are six dates opposite two items, with nothing to distinguish, except, "With G. L. M., Lynx., and *Wing*, Lynxville, Ferryville, De Soto;" and at another place nine dates opposite three items, with nothing to distinguish, except, "Operating from Prairie du Chien to Lynxville. Destroyed two bait nets."

The return of the county clerk to the circuit court attached to such notice of appeal is to the effect that the within and annexed return was a true statement of the proceedings of the county board in the case appealed from, and that the notice of appeal, bond, and other papers attached were "all the papers in my [his] possession relating to such appeal." The only return annexed to such certificate, besides the notice of appeal and bond, was a pamphlet of thirty-two pages, entitled "Proceedings of the County Board — Annual No-

"16, 17 July 8, 9, 11, 12, with Wing in sloughs and islands. (See original account.)

"20, 21, 22 July 13, 14, 15, with Wing and G. L. M. to Lynxville and Ferryville. (See original.)

"23, 28 July 18, 19, 20, 21, 22, 23, with G. L. M., Lynx., and Wing, Lynxville, Ferryville, De Soto.

. . . . . .

"49, 50, 51 August 26, 27, 28, operating against hunters.

"52 September 3, with Wing, burned net and boat in possession of W. Gremore and B. Contell.

. . . . . .

"84 October 13, Ambarass S, Curville S.

"85 October 17, Spring lake, Curville S.

"94 October 18, 19, 20, 21, 22, 23, 24, 25, 26, operating from Prairie du Chien to Lynxville. Destroyed two bait nets.

"97 October 27, 28, 29, Big L., Ambarass S.

. . . . . .

"102 November 3, down channel Catfish S.

"Total 102 days.

"CHARLES W. MILLER,

"Local Deputy Fish and Game Warden for Crawford County."

vember Session of that Body for the Year 1898 — The Official Report of its Work." In this pamphlet, under the head of "Report of Committee on General Claims," is the following on page 25: "*Charles W. Miller*, deputy game and fish warden, claimed $153.00. Referred to full board;" and on the same page is the following: "The bills of *Isaac Wing* and *Charles W. Miller*, deputy game and fish wardens, being bills No. 14, 20, and 23, referred to in the report of the committee on general claims, were brought up. . . . The bills were disallowed by a unanimous vote on call of yeas and nays, *for the reason that the bills were not properly itemized.*"

In the other case the defendant appeals from a judgment based upon a verdict in favor of the plaintiff *Isaac Wing* for $141, and it appears from the record that it got into the circuit court by virtue of a notice of appeal given by *Isaac Wing*, December 29, 1898, to the county clerk, similar in all respects to the notice of appeal in the *Miller* case, except that the account was for services rendered by *Wing*, as deputy fish and game warden, between November 17, 1897, and November 5, 1898, and no particulars are stated as to what the services were for, or where rendered, but merely giving dates,— as, for instance, nineteen dates in April, 1898, $28.50; ten dates in May, 1898, $15; eleven dates in June, 1898, $16.50; twenty-two dates in July, 1898, $33; and so on,— and the return of the clerk to the same is in every respect similar to his return in the *Miller* case.

It is contended that there was nothing before the circuit court upon which it could act, for the reasons: (1) The account which is claimed to have been presented to the board of supervisors was not returned to the circuit court, but only the notice of appeal, with what purports to have been a copy of such account. (2) If the account presented to the board had been lost or destroyed and it had been proved that such copy was in fact a true copy, still it was not such

a statement of account as was required by the statute. (3) Even if the statement filed had complied with the statute, yet the board never disallowed the same upon the merits, but, as appears from the return, merely refused to act upon the same, "for the reason that the bills were not properly itemized."

The county clerk certified, as he was required by statute, that he therewith returned "all the papers in my [his] possession relating to such appeal." Sec. 684, Stats. 1898. The papers so certified contained no such account, but only what the plaintiff's notice of appeal designated as such copy. The defendant could not be forced to accept and treat such copy as the original without proof of loss or destruction and that it was in fact a copy; and certainly the defendant's counsel consented to nothing upon the trial. If any such loss or destruction was claimed, then a further return to that effect should have been obtained by the plaintiff.

Assuming the copy in the record to be a true copy of the statement presented, the question recurs whether it was sufficient to satisfy the statutes. The statutes prohibited the action from being originally brought in the circuit court, and provided that it could only get there by appeal from the disallowance of the claim in whole or in part. Secs. 676, 682, 683, Stats. 1898. The statute, moreover, provides that: "Every person . . . having any such claim against any county shall make a statement thereof in writing, setting forth the nature of his claim and the facts upon which it is founded, and if the claim be an account the items thereof separately, the nature of each and the time expended in the performance of any service charged for, when no specific fees are allowed therefor by law, and, if the claim be for mileage, the statement shall specify dates and places so as to show between what points and when the travel charged for was had and also the purpose for which such travel was had. Such statement shall be verified by the affidavit of

the claimant, his agent or attorney, and filed with the county clerk; and no such claim against any county shall be acted upon or considered by any county board unless such statement shall have been so made and filed." Sec. 677. Manifestly, neither of the claims in question is accompanied by a copy of such statement — much less such original statement.

But it is claimed that, however indefinite and uncertain the statement filed may have been, yet it was sufficient to give the board jurisdiction; and hence that an appeal from its action was sufficient to give the circuit court jurisdiction. In some early cases, when the statute was substantially different than at present, certain features of the then-existing statute were held to be merely directory. *Parker v. Grant Co.* 1 Wis. 414; *Eaton v. Manitowoc Co.* 40 Wis. 668. In a more recent case, in an opinion by Mr. Justice LYON, this court, in view of the change in the statute, expressly left it undetermined whether the failure to comply with that section in making such statement "did not go to the jurisdiction of the board to allow an account not thus itemized and verified." *Outagamie Co. v. Greenville*, 77 Wis. 171. And in that case it was expressly held that, where accounts are not properly itemized as required by that section, their allowance by the county board was not binding upon the town. *Id.* The section quoted expressly declares that "no such claim against any county shall be acted upon or considered by any county board unless such statement shall have been so made and filed," and hence is more imperative than the statute simply requiring a bond to be given on appeal from the decision of the county board. Secs. 683, 684, Stats. 1898. And yet it has been held by this court, under a similar statute requiring a bond to be given on appeal from the decision of the common council, that the failure to give such bond, or the giving of an insufficient bond, would prevent the circuit court from acquiring jurisdiction. *Drink-*

wine v. Eau Claire, 83 Wis. 428. The manifest purpose of the statute requiring such statement was to protect the public funds and taxpayers of the county from the reckless, negligent, or improvident action of county boards. We must hold that the language of the statute is mandatory and must be substantially complied with. Where the statement filed with the county board is insufficient, or indefinite and uncertain, the board may, undoubtedly, require it to be made more definite and certain, or to conform to the requirements of the statute, before allowing or disallowing it in whole or in part. *Eaton v. Manitowoc Co.* 40 Wis. 668; *French v. Dunn Co.* 58 Wis. 402. This court has held that, where the account filed is in form and substance as required by the statute, it is sufficient as a complaint on appeal to the circuit court. *Grimm v. Jefferson Co.* 62 Wis. 572. The converse of the proposition would seem to be that if it is not substantially as required by the statute, then it would be insufficient as a complaint.

In the case at bar the return states that "the bills were disallowed . . . for the reason that the bills were not properly itemized." Notwithstanding the use of the word "disallowed," yet it is obvious from its connection with what follows that the board did not pass, nor attempt to pass, upon the merits of the bills,—much less to disallow the same, but merely suspended action until such bills should be properly itemized. In other words, the bills not having been disallowed in whole or in part, there was nothing to appeal from.

It is claimed that each of the plaintiffs was appointed "deputy fish and game warden" for the defendant county under sec. 1498*b*, Stats. 1898, and acted as such during the times in question. That section, as it then stood, was silent as to authority from the county board to make such appointment. The section has since been amended so as only to allow such appointment to be made when authorized by resolution of the county board. Sec. 2, ch. 312, Laws of 1899.

But before that amendment, and at the time of the appointment of the plaintiffs, respectively, the statute provided that: "The deputy wardens appointed in any county shall be paid by the county for which they shall be appointed *out of any fund set apart for the purpose* of enforcing the fish and game law; their compensation to be fixed by the chairman of the county board and the county clerk of such county." Sec. 1498*d*, Stats. 1898. This would seem to suggest the necessity of authority from the county board. It is in evidence in each of these cases that up to January, 1899, no fund had been set apart by the county board for the purpose of enforcing the fish and game laws. Such being the facts, we have a very grave doubt of the power of the fish and game warden, upon the recommendation of the officials named in sec. 1498*b*, to force an indebtedness or liability against the county, without the consent and authority of the county board. Had such fund been set apart for such purpose, such authority might, perhaps, have been implied. But such deputy wardens were only to be paid "out of any fund set apart for the purpose," and hence it may be inferred that, until such fund is so set apart, there is no liability. But the question was not argued, and we refrain from deciding it.

By the Court.—The judgment in each case is reversed, and the cause is remanded for a new trial.

ANDERSON and another, Respondents, vs. JOHNSON and others, Appellants.

February 27—March 20, 1900.

Promissory notes: Defense: Fraudulent transfer: Real party in interest: Counterclaim: Malicious abuse of process: Conspiracy.

1. In an action upon a note which plaintiffs, for a sufficient consideration, had bought with other assets of the payee, a corporation, at a receiver's sale which had been confirmed by the court, it is no de-

fense that plaintiffs had made such purchase intending to hold merely a nominal title to said assets and to allow a stockholder of the corporation to reap the benefit therefrom, in fraud of the other stockholders and creditors of the corporation.

2. A counterclaim in such action, alleging that plaintiffs had conspired with said stockholder to procure the title of the corporate assets in the name of the plaintiffs, but for the real benefit of said stockholder, and alleging, also, a malicious abuse of process by said stockholder against the defendants, but failing to connect plaintiffs therewith by any averment that they had conspired with said stockholder to injure defendants by the malicious use of process, is *held* not to state a cause of action against the plaintiffs.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action on a judgment note given September 9, 1896, for $1,360, by the defendants under the firm name of Johnson, Felland & Co. to the Wagg-Anderson Woolen Company, an Illinois corporation, and afterwards purchased at judicial sale by the plaintiffs as copartners. One branch of the case has been in this court before upon an intervention proceeding, and will be found reported in 101 Wis. 385. In this proceeding it was claimed that the Chicago Title & Trust Company was in fact the owner of the note, but it was held by the circuit court that such claim was not substantiated, and that decision was affirmed in this court.

Upon the return of the case to the circuit court the defendants made answer to the complaint, claiming by way of defense that the plaintiffs were not the real parties in interest, but that one A. J. Anderson, son of the plaintiff *Gilbert Anderson*, and nephew of the plaintiff *Andrew Anderson*, was in fact the owner of the note and the real party in interest. The answer also contained an alleged counterclaim, in which the following facts were set forth:

(1) That the Wagg-Anderson Woolen Company was a corporation, which existed and did business in the city of Chicago until the 25th of January, 1896, one Howard N. Wagg and A. J. Anderson being the principal stockholders.

(2) That on January 25, 1896, A. J. Anderson conceived a plan of defrauding the creditors and stockholders of said corporation and converting the corporate assets to his own use, and caused a fraudulent judgment to be entered on behalf of the Dane County Bank against said corporation, and procured the appointment of the Equitable Trust Company as the receiver of the said corporation, and on the 27th of February following procured a decree of court appointing one Forey as receiver in place of the trust company, and authorizing him to compromise the debts of the corporation at sixty-five cents on the dollar in notes indorsed by A. J. Anderson, and to carry on the business of the corporation with A. J. Anderson, and that the business was so carried on until July, 1896, when the firm of Anderson & Co. (the plaintiffs herein) proposed to buy the remaining stock and pay all debts; but that the plaintiffs really had no interest in the matter, but made said proposition for the benefit of A. J. Anderson.

(3) That on the 9th of December, 1896, the defendants were partners in business at Madison, Wisconsin, the defendant *Helmer Hanson* being a nominal member of the firm only and a judgment debtor of the Wagg-Anderson Company in the sum of $300, but that he had been discharged from his debts in insolvency proceedings.

(4) That on the 15th of August, 1896, A. J. Anderson came to Madison, and threatened one C. O. Felland, a clerk of the defendants, that he would issue execution on the old judgment in favor of the Wagg-Anderson Company against *Helmer Hanson* unless the defendants' firm gave him a note for $300, due in one year, which note said Felland finally gave.

(5) That on the 9th of September, 1896, the defendants were indebted to the Wagg-Anderson Company upon account in the sum of $1,359.60, and that on that day they settled said account with said A. J. Anderson by giving

him a four-months judgment note, signed in the firm name, for $1,360, being the note in suit; that $300 was paid in instalments thereafter upon said note, but that A. J. Anderson indorsed said payments upon the $300 note aforesaid,—a fact which the defendants first learned in November, 1896, when A. J. Anderson sent them the $300 note as fully paid; and that upon receiving said note they repudiated the transaction, and disaffirmed the same, and informed A. J. Anderson that said note was obtained by misrepresentations and would not be paid.

(6) That A. J. Anderson came to Madison on December 9, 1896, and in the nighttime caused judgment to be entered on the judgment note in suit for $1,060 and costs, and also caused execution to be issued thereon to the sheriff, who seized the defendants' stock of goods; and that A. J. Anderson then stated that he made said seizure in order to compel the defendants to secure *Helmer Hanson's* debt, and that, if they did not, the sheriff would remain in possession and destroy the defendants' business; and that under the influence of these threats the defendants gave the note for $300, and thereupon A. J. Anderson released said levy; and that all the acts aforesaid were wrongful, unlawful, and malicious, and done in order to cause the defendants by duress to execute said note.

(7) That by the entry of said judgment the defendants' credit was destroyed, and that afterwards such proceedings were had in the circuit court for Dane county that said judgment was set aside and declared null and void and a judgment for costs rendered in favor of the defendants; and that the note upon which said judgment was entered is the same note in suit in this action.

(8) That the defendants have been injured by the said malicious and wilful acts in the sum of $5,000. "That the said A. J. Anderson, at the time of the doing of all these acts, was *conspiring with the said plaintiffs in this action to*

obtain apparent legal title of all the assets of the Wagg-Anderson Woolen Company for the purpose of establishing and carrying on said business in the name of Anderson & Co., who, are these plaintiffs, for the benefit of him, the said A. J. Anderson, and permitting the said A. J. Anderson to use their name in all of said matters, purchasing of said assets and carrying on the said former business of the Wagg-Anderson Woolen Company for the benefit of him, the said A. J. Anderson; and *that all of the said wrongful acts with respect to the entry of said judgment against these defendants were done by the said A. J. Anderson under the general authority and permission of these plaintiffs, and for his own use and benefit.*

"These defendants allege that all matters, including the wrecking of the Wagg-Anderson Woolen Company by the said A. J. Anderson, and the appointment of the various receivers, and the securing of the various compromises, and the procuring of the various decrees in the circuit courts for Cook county authorizing the same, and the final transferring of the assets of the Wagg-Anderson Woolen Company to the said plaintiffs, and the entry of the said judgment, were part of the same plan for the benefit of the said A. J. Anderson; and that the said plaintiffs had permitted the said Anderson to use their names in all of said matters to enable him to avoid and escape liability upon his own part with respect to wrongful acts done by him in regard to said business, and especially the wrongful and malicious entry of said judgment on cognovit against these defendants; and these defendants allege that in equity and justice the said plaintiffs should be and are responsible for any damages occasioned by said wrongful act of the said A. J. Anderson in carrying out said schemes, and that the same should be equitably set off against any claim which may exist against the defendants arising out of the note or otherwise."

Upon the trial it was proven without substantial dispute

that the plaintiffs bought the note in suit, with the other assets of the Wagg-Anderson Woolen Company, at judicial sale on the 28th day of September, 1896, and paid sufficient consideration therefor. A demurrer *ore tenus* to the counterclaim was sustained by the court, and all testimony thereunder rejected, and a verdict was directed for the plaintiffs, and from judgment entered on such verdict the defendants appeal.

For the appellants there was a brief by *Hall & Sheldon*, attorneys, and a brief in reply signed also by *A. R. Bushnell*, of counsel, and oral argument by *Mr. F. W. Hall* and *Mr. Bushnell.*

For the respondents there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones.*

WINSLOW, J. The testimony was undisputed in this case that the plaintiffs purchased the assets of the insolvent Wagg-Anderson Company, including the note in suit, at receiver's sale, and paid value for them, and that the sale was confirmed by the court. Whether they intended to place such assets in the hands of A. J. Anderson to manage as his own while retaining merely nominal title themselves, or made the purchase with a view to allow him to reap the benefit therefrom, are questions which might possibly be material to creditors of the Wagg-Anderson Woolen Company, or to creditors of A. J. Anderson, but it is not perceived how they can be material at all to these defendants, who belong in neither of those classes. The transfer was certainly perfectly good so far as the debtors of the Wagg-Anderson Company are concerned.

The only question of any difficulty in the case is the question whether the counterclaim was sufficient. If any cause of action be set forth in the counterclaim at all, it is evidently one for malicious abuse of legal process. Assuming (but not deciding) that such a cause of action existing against

the plaintiffs is properly pleadable as a counterclaim in this case, still we think that there are not sufficient allegations showing the plaintiffs to be responsible for the alleged wrong. The counterclaim shows distinctly that A. J. Anderson was the man who committed all the overt acts, and it is attempted to connect the plaintiffs therewith by allegations of conspiracy. We think, however, that these allegations clearly fall short of alleging that the plaintiffs at any time conspired with A. J. Anderson to injure the defendants by abusing the process of the court. Fairly and reasonably construed, the conspiracy alleged is a conspiracy to procure the title of the corporate assets of the defunct corporation in the name of the plaintiffs, but for the real benefit of A. J. Anderson. This is the sum and substance of the conspiracy as first charged, and afterwards referred to as "the same plan for the benefit of A. J. Anderson." The acts complained of are no part of such a conspiracy. Had the defendants desired to charge that the plaintiffs conspired with A. J. Anderson to injure and oppress the defendants by the malicious use of the process of the court, such an allegation would have been easy to make; but it seems to have been industriously avoided. The charge that the plaintiffs permitted A. J. Anderson to "use their names in all of said matters" is unavailing, because the judgment upon cognovit was not entered in their names, but in the name of the Wagg-Anderson Woolen Company, and the execution must have followed the judgment. Upon this ground, if upon no other, we think that the counterclaim was insufficient.

By the Court.—Judgment affirmed.

SUTTON, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

February 27 — March 20, 1900.

Appeal: Insufficient return: Dismissal.

An appeal from a judgment will be dismissed unless a judgment roll satisfying the requirements of sec. 2898, Stats. 1898, has been transmitted to this court as required by sec. 3050.

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Appeal dismissed.*

An order was entered dismissing the action and for judgment in defendant's favor for costs, because plaintiff, after the reversal, on appeal to this court, of a judgment rendered in his favor, failed to bring the cause again to trial in the circuit court within one year. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *J. J. Sutton, in pro. per.*, and for the respondent on a brief by *H. L. Humphrey* and *T. A. Polleys*, attorneys, and *Thomas Wilson*, of counsel.

MARSHALL, J. The papers sent to this court by the clerk of the circuit court consist of some affidavits, the order for judgment, and some other papers. The clerk's certificate is to the effect that the papers transmitted are all the papers on file in his office. The return does not contain the pleadings, or anything satisfying the requirements of sec. 2898, Stats. 1898, as to the contents of a judgment roll, or a bill of exceptions, or a certificate showing what papers were used on the motion to dismiss. Respondent's counsel called the court's attention to the insufficiency of the return and asked that the appeal be dismissed because of such insufficiency.

Sec. 3050 requires the judgment roll to be transmitted to this court as a part of the return on appeal from a judgment. The court has often held that, without a return in substantial compliance with the statute, the appeal cannot be entertained. *Superior C. L. Co. v. Superior*, 104 Wis. 463, and cases cited.

By the Court.— The appeal is dismissed.

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106 226
107 283
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106 226
112 [2]284

106 226
114 [1]360

106 226
116 [2]256

106 226
117 [2]446

THE STATE EX REL. THE CITY OF MILWAUKEE and another vs. LUDWIG, Judge, etc.

February 27 — March 20, 1900.

Discontinuance of action: Denial of leave: Jurisdiction: Supreme court: Superintending control: Mandamus.

1. The service and filing, by plaintiff, of a notice of discontinuance does not of itself, without judicial action thereon, terminate the action and deprive the court of all jurisdiction therein. The court may and should consider the effect of a discontinuance upon the rights of others, and for the protection of such rights may deny an application for leave to discontinue, and may substitute another plaintiff. A remark in *Noble v. Strachan*, 32 Wis. 314, overruled.
2. In the exercise by the supreme court of its superintending control over inferior courts the writ of *mandamus* will not be used to perform the functions of appeal or writ of error. In order to justify the issuance of the writ the duty of the lower court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by *mandamus* speedy and prompt.
3. A lotowner, on behalf of himself and others, brought an action to restrain a street railway company from accepting an ordinance authorizing extensions of its lines and from constructing one of such extensions along the street in front of his lots. He obtained an injunction *pendente lite*, and defendants moved to vacate it and also secured an injunction restraining plaintiff and all other taxpayers and abutting owners from commencing any similar suit until the determination of said motion. Before such determination plaintiff, acting through attorneys other than his attorneys of

record, attempted to discontinue his action under circumstances calculated to arouse suspicion of collusion with defendants. The court permitted plaintiff to withdraw from the action, but refused to allow it to be discontinued, and, on motion of plaintiff's attorneys of record, substituted as plaintiff the owner of land abutting on another street, similarly affected by the ordinance, with leave to adopt the complaint or file a new pleading. *Held*, that under the circumstances the supreme court would not interfere by *mandamus* to reverse the decision of the lower court and compel the dismissal of the action.

MANDAMUS to J. C. LUDWIG, Judge of the Superior Court of Milwaukee County. *Peremptory writ denied.*

A few days after the suit of *Schwartzburg v. The Mayor and Aldermen of the City of Milwaukee*, which is quite fully described in the opinion in the case of *State ex rel. Rose v. Superior Court*, 105 Wis. 651, there was commenced by the same attorneys a suit in the name of Trentlage against the city of *Milwaukee* and the *Milwaukee Electric Railway & Light Company*, which appears to have been instigated by the same persons who were responsible for the Schwartzburg suit, and the complaint in which embodies a large part of the complaint in that action, and was addressed principally toward enjoining the defendant street railway company from accepting the ordinance, the passage of which was attempted to be restrained by Schwartzburg. The plaintiff, Trentlage, describes himself as a resident, citizen, elector, and taxpayer in the city of *Milwaukee*, and as owning two described lots abutting on, and extending to the center of, First avenue, in said city, and declares that he brings this action in his own behalf and in behalf of all other taxpayers and abutting owners in said city similarly situated. The complaint also, in addition to the allegations as to the passage of the ordinance, adopted largely from the Schwartzburg complaint, alleges that one of the extension lines proposed to be authorized by said ordinance extends along First avenue, and in front of the plaintiff's premises, and that a build-

ing in pursuance thereof will involve a widening and grading of that street, and the incumbering of the same, across his premises, with poles, wires, and tracks. The relief demanded was that the railway company be restrained from accepting said ordinance, or doing any act to accomplish such acceptance, or entering upon any part of the premises of the plaintiff, or widening said First avenue, or laying tracks or erecting poles or wires thereon, and further prayed that the grant by the common council be set aside and annulled, as invalid. An injunction *pendente lite* was secured, substantially covering the ground of the prayer of the complaint, and motion to vacate the same was made.

The motions to vacate the injunctions in the Trentlage case and the Schwartzburg case were taken up very much together by the court, and the affidavits and other proceedings in the two cases seem to have been very much interwoven. In the course of those motions the defendants had secured an omnibus injunction restraining the commencing of any other suits or taking of any steps, except to discontinue, in the Trentlage case or any other case, until the disposition of the pending motions to vacate the injunctions. As the argument on those motions was approaching conclusion, and on the 29th day of January, 1900, while the court was engaged with the hearing of the motion to vacate in the Trentlage case, the plaintiff, Trentlage, attempted to present to the court, by an attorney not of record, a discontinuance of his suit, in the following words:

"I, J. G. Trentlage, plaintiff in the above-entitled action, hereby dismiss and discontinue the action above entitled, and consent that an order be entered to that effect without further notice.

"To the *City of Milwaukee* and the *Milwaukee Electric Railway & Light Company*, defendants above mentioned."

The attorney, Mr. Sheridan, of the firm of Sheridan & Wollaeger, also attempted to present a power of attorney

authorizing his firm to effect a dismissal of the action, and in terms revoking the authority of the plaintiff's attorneys of record. He also had an affidavit by Trentlage to the general effect that he had been led by misrepresentations to lend his name as plaintiff in that suit. The court declined to permit the pending matters to be interrupted, and did not receive into consideration the proposed discontinuance that day. At the adjournment of court, the plaintiff filed it with the clerk.

On the following day, January 30th, the defendants presented the same notice of discontinuance, and asked for an order of dismissal, whereupon Mr. Timlin, attorney of record for the plaintiff, presented a petition for the substitution of the Linden Land Company as plaintiff to continue the suit, accompanied by an affidavit that the Linden Land Company was the owner of lands abutting on Locust street, over which another provision of the ordinance granted franchise to construct tracks, obviously entirely distinct from the line over First avenue. The court, after hearing argument, held that the Trentlage suit had no standing as a taxpayer's suit, but that a cause of action was stated in the interest of himself as an abutting owner upon a street likely to be affected by the building of extensions authorized by the ordinance, and as a suit to restrain injury to the plaintiff in that capacity, and others similarly situated, the action might be sustained. He thereupon granted the application of the plaintiff for discontinuance, to the extent of permitting him to withdraw as plaintiff, but refused to dismiss the suit, and made an order continuing the same in existence and introducing the Linden Land Company as plaintiff therein on behalf of itself and others similarly situated, with leave within a certain time to either adopt the complaint verified by Trentlage or to file its own complaint.

On relation of the defendants an alternative writ of *mandamus* was granted, commanding the respondent that im-

mediately upon the receipt of the writ he set aside and vacate the above-described order of January 30th, denying the defendants' motion that the Trentlage suit be dismissed and granting the petition of the Linden Land Company to be joined as plaintiff therein, and that he enter an order, upon the defendants' motion, dismissing the Trentlage action. Due return was made, from which, together with the papers therein referred to, the foregoing facts appear, among others not deemed important.

For the relators there were separate briefs by *Winkler, Flanders, Smith, Bottum & Vilas* and *Miller, Noyes, Miller & Wahl*, of counsel, and oral argument by *Geo. P. Miller, J. G. Flanders*, and *Hugh Ryan*. To the point that the rule under which a plaintiff has an absolute right to discontinue is the same where the action is brought on behalf of himself and all others in a similar situation, so long as none of the "others" have come into the case and actually become parties thereto, they cited 1 Daniell, Ch. Pl. & Pr. (5th Am. ed.), 794; *Piedmont & A. L. Ins. Co. v. Maury*, 75 Va. 508; *Innes v. Lansing*, 7 Paige, 583; *Beals v. W. U. Tel. Co.* 53 Neb. 601; *Handford v. Storie*, 2 Simons & S. 197; *Day v. Buckingham*, 87 Wis. 215, 221; *Hirshfield v. Fitzgerald*, 157 N. Y. 166; 6 Ency. of Pl. & Pr. 853, 854.

For the respondent there was a brief by *Toohey & Gilmore* and *Timlin, Glicksman & Conway*, and oral argument by *W. H. Timlin*.

Dodge, J. 1. In this case we are solicited to exercise that superintending power of the supreme court over inferior courts which was recently discussed and described at length in *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, and it is asserted that the conduct of the court below justifies and requires the exercise of either of two phases of that power: First. That to enforce the *jurisdiction* of inferior courts, either by prohibiting acts outside of their jurisdic-

tion, or commanding them to proceed to its exercise in cases of refusal. Illustrations of this phase are found in *State ex rel. Att'y Gen. v. Eau Claire Co. Cir. Ct.* 97 Wis. 1; *State ex rel. C. & N. W. R. Co. v. O., A. & B. W. R. Co.* 100 Wis. 538; *State ex rel. Meggett v. O'Neill*, 104 Wis. 227, and *State ex rel. Rose v. Superior Court*, 105 Wis. 651. Under this head it is urged that the plaintiff had the absolute right to discontinue his action, and that by the filing of the notice the discontinuance was accomplished, and the case no longer had any existence. Of course, if the case were so out of court and nonexistent, no jurisdiction would exist to make any order or take any step, any more than as if no suit had been commenced; and the attempted retention of and procedure in it would have been a usurpation of power, which, if sufficiently injurious and incapable of other remedy, might invite interference by this court.

The first subject of inquiry, then, is whether the suit of Trentlage against the *Milwaukee Electric Railway & Light Company* was in court—whether it had any existence as an action—on the 30th day of January, after the plaintiff's notice of discontinuance had been delivered to the defendants and filed with the clerk. The negative of this proposition is hardly asserted in the briefs, but was substantially contended for upon the oral argument, and such contention was supported by quotation from certain decisions of this court,—notably, *Spaulding v. M. & H. R. Co.* 12 Wis. 607; *Bertschy v. McLeod*, 32 Wis. 205; *Noble v. Strachan*, 32 Wis. 314; *Juneau Co. v. Hooker*, 67 Wis. 322. Upon careful examination, none of these cases, except, perhaps, *Noble v. Strachan*, furnishes support for the position so taken, namely, that the act of the plaintiff in formally declaring his election to discontinue did *ex proprio vigore* terminate the suit and deprive the court of all *jurisdiction* to take any judicial action with reference thereto. In *Spaulding v. M. & H. R. Co.* an *order* of discontinuance had in fact been en-

tered. True, it was a mere side-bar order entered *ex parte* by the clerk, as then authorized; but it was ostensibly, at least, the act of the court, effectuating plaintiff's election to discontinue. This court declined to decide whether even that order sufficed to terminate jurisdiction of the circuit court over the proceedings, but held that, whether so effective or not, the situation constituted no ground for staying another suit commenced by the plaintiffs. In *Bertschy v. McLeod* the right of a plaintiff to discontinue his action is asserted, but the discontinuance in that case was held to have been accomplished by *the order*, which, as in the preceding case, was entered *ex parte* by the clerk, but, of course, was ostensibly judicial action, the same as is a judgment entered on default by the clerk under present practice statutes. In *Juneau Co. v. Hooker* a notice of discontinuance was served on the defendants, and in open court, though *ex parte* on application of plaintiff, the court orally directed discontinuance to be entered on the minutes. On plaintiff's attempt to reinstate the case, urging informality of the oral order of discontinuance, this court denied such application, holding that: "An entry by the clerk in his minutes of the judicial action of the court is sufficient evidence thereof. A formal order signed by the judge was not necessary. An order entered on the minutes of the clerk is sufficient for a full discontinuance of the case."

It will thus be seen that in all these decisions the court recognized the efficacy and the necessity of judicial action to completely accomplish discontinuance. This view is enforced in many other decisions, in some of which are discussed the considerations which render proper or improper the complete dismissal of a suit upon plaintiff's application, or even on consent of all parties to the record. *Morris v. Baker*, 5 Wis. 389; *Selleck v. Phelps*, 11 Wis. 380; *Wakeley v. Delaplaine*, 15 Wis. 554; *Howard v. Osceola*, 22 Wis. 453; *Hutchinson v. Paige*, 67 Wis. 206; *Grignon v. Black*, 76

Wis. 674, 685; 1 Beach, Mod. Eq. Prac. § 460; *Thomas v. Thomas*, 3 Litt. 9; *Penobscot R. Co. v. Mayo*, 60 Me. 306; *Hanchett v. Ives*, 133 Ill. 332; *McLain v. Draper*, 109 Ind. 556; *Winans v. Winans*, 124 N. Y. 140; *Belmont N. Co. v. Columbia I. & S. Co.* 46 Fed. Rep. 336; *McAden v. Jenkins*, 64 N. C. 796; *La Tourette v. Fletcher*, 6 App. Cas. (D. C.), 324.

From these authorities it is obvious that, when a plaintiff attempts to exercise his so-called absolute right to discontinue an action prosecuted by him, varied and numerous considerations may need to be weighed by the court before reaching its conclusion whether to allow or deny effect to such attempt. The effect of a termination of the suit upon others, either the defendant or third parties, or sometimes the public, is to be considered, and, if any prejudice to such persons is discoverable, whether it is such as to warrant retention of the suit. We need not now discuss, or express approval or otherwise of, the conclusions reached in these cases. It suffices for the present subject to illustrate the frequency with which reasons need to be, and are, weighed by the courts; thus establishing that a judicial function is necessarily exercised whenever a plaintiff seeks to withdraw a suit once commenced. The duty and power to examine, consider, and decide is jurisdiction. Such duty and power were cast upon the superior court when application was made to it for an order discontinuing the present suit, and its determination to deny that application, and to continue the suit for the protection of some one else, was not an act beyond jurisdiction; nor was it a refusal to exercise its jurisdiction, for the judge duly considered and decided.

In the light of the foregoing, it is obvious that the remark found in the opinion in *Noble v. Strachan*, 32 Wis. 314, "I think that the order denying the application for leave so to discontinue is a nullity, and may be disregarded entirely," is inaccurate. It is contrary to the reason and im-

plication of every other case in this court, and must be overruled. We so overrule it the more readily for the reason that it is purest *obiter dictum*, delivered in a case of which, by reason of defects in the appeal, this court decided that it had no jurisdiction, and apparently, from the phraseology, was merely an expression of the personal opinion of the learned justice who delivered the decision of the court, which was based on other grounds.

2. But it is urged, though the inferior courts be acting within their jurisdiction and exercising merely the judicial powers with which they are vested, this court should interfere "to control the course of ordinary litigation in such inferior courts," "not only by restraining their excesses, but by quickening their negligence and obviating their denial of justice." That such power is vested in this court cannot be denied, nor that from such power results a duty to exercise it fearlessly and unflinchingly in a proper case. On the other hand, however, it must not be forgotten that the circuit courts of the state, and the superior courts of Milwaukee county, are the courts of original jurisdiction, wherein it is the plan of the constitution that the rights of parties in general shall be litigated and adjudicated, subject to correction of errors by this court when its appellate jurisdiction is invoked. In those courts is vested, *ex necessitate*, broad discretion. Around the selection of the judges who are to administer them are thrown most careful safeguards, and upon them is reposed a responsibility and confidence of a very high order. There can be no doubt that the framers of the constitution indulged in the most confident presumption that those courts would be presided over by men of high learning, ability, and integrity; and that confidence and presumption has been well verified by the result throughout the state. No more fitting and striking eulogy could be pronounced than the summary of the judicial experience of the state suggested by Mr. Justice WINSLOW in *State ex rel.*

Fourth Nat. Bank v. Johnson, 103 Wis. 616, in pointing out that, in the half century since the constitution was adopted, but three or four instances had occurred of such departure from duty by the circuit courts as to require the exercise of the superintending control vested in this court. If justice is to be not unduly burdened with delay and expense, it must be dispensed by the lower courts, their administration of the details of litigation must in the main control, and the judges who administer those details must feel that on them rests the responsibility for any wrong resulting to litigants from their acts. If that sense of responsibility be diminished by frequent interference and direction from this court, the reflex effect upon the trial courts themselves, and upon the high respect in which they should be held by the community, will be most prejudicial. Such considerations must weigh strongly to deter us from hastening to assume such responsibility and to control or dictate under our superintending power in individual cases even of apparent hardship.

These remarks are indulged in because of the apparent impression that this court has recently found or declared a new field of jurisdiction and activity, in which, promptly, without waiting for final determination of the court below, and without the formalities of procedure insisted on in appeals to give to each party adequate information of the contention of the other and opportunity to prepare and present his own, any dissatisfaction over the conduct of a trial court may be examined, and its course directed, although thereby may be hastily adjudicated the whole merits of the litigation in advance. This is a mistaken impression. The court has neither found nor declared any new power or new jurisdiction. It did, in *State ex rel. Fourth Nat. Bank v. Johnson, supra*, but add one more to the very few instances in which a recognized constitutional power was found necessary to be exercised. We said upon this subject in *State ex rel. Meggett*

v. O'Neill, 104 Wis. 227: "As the ordinary appellate revisory powers of this court have been found sufficient in the past, with extremely rare exceptions, it is believed that in the future emergencies transcending their sufficiency will seldom occur." In that confidence we still rest, trusting that the ensuing half century will be no more prolific of instances of misconduct of trial courts requiring correction otherwise than on appeal.

Not the least important of the utterances of this court in *State ex rel. Fourth Nat. Bank v. Johnson*, *supra*, are the declarations of the limits which we ought to and shall impose on ourselves in the exercise of the powers there discussed. We declared that such jurisdiction was "not to be exercised on light occasion, or when other and ordinary remedies are sufficient" (p. 618), and said further: "It is not meant by this, however, that *mandamus* will be used to perform the functions of appeal or writ of error, as seems to have been the tendency in the supreme courts of Alabama and Michigan. The duty of the court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by *mandamus* speedy and prompt, in order to justify the issuance of the writ."

The few instances of the actual exercise of the superintending control serve to emphasize these restricted limitations. In *State ex rel. Att'y Gen. v. Eau Claire Co. Circuit Court*, 97 Wis. 1, and *State ex rel. Rose v. Superior Court*, 105 Wis. 651, the court below was proceeding, wholly without jurisdiction, to adjudge guilt of criminal contempt upon citizens, and to impose upon them punishment as criminals,— an invasion of the highest of individual rights, of which the sentimental aspect, at least, would be irreparable and remediless. In *State ex rel. Brownell v. McArthur*, 13 Wis. 407, *State ex rel. Spence v. Dick*, 103 Wis. 407, and *State ex rel. Mitchell v. John-*

son, 105 Wis. 90, there were presented refusals of the court to make orders, changing venue in the first two and of dismissal in the last, which were made the imperative duty of the court by statutes so absolute in terms as to leave not only no room for discretion but none for the exercise of judicial consideration. While the acts sought to be compelled were technically within the jurisdiction of the circuit court, the refusal of them was not appealable, and injury therefrom was obvious and grievous. In the two recent cases (*State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, and 105 Wis. 164) a most extraordinary exigency was presented. Not only were the orders sought to be compelled by *mandamus* so clearly enjoined upon the circuit court as to leave for it neither discretion nor judicial consideration, but the whole record showed such misconception by the court as to the relative importance and dominance of the interests of the respective parties, and such a series of judicial acts in effect, at least, substantially rendering abortive any efforts, not alone to vindicate, but even to litigate, the dominant rights of creditors, that this court deemed summary and radical action essential to recall the circuit court from a wholly erroneous policy. The consideration, ordinarily so cogent, that the acts complained of might have been reviewed on appeal, was overcome in those cases by the fact that, before appeals could be heard, rights enormous in amount were likely to be destroyed by statutes of limitation. In *State ex rel. Johnson v. Washburn*, 22 Wis. 99, *State ex rel. C. & N. W. R. Co. v. O., A. & B. W. R. Co.* 100 Wis. 538, and *State ex rel. Meggett v. O'Neill*, 104 Wis. 227, this court refused to act, predicating its refusal principally on the existence of another ordinary remedy, in that the action of the circuit courts could be reviewed on appeal, but also, in the last of those cases, on the absence of diligence in the relator.

In the light of these general rules and these illustrations

of the policy of the court, turning to the case in hand we find that the complaint presents a suit attempted to be brought, ostensibly at least, to protect rights of others as well as plaintiff's. He, by his affidavit, also made obvious that his name was being used in the interest of others; for such others were to pay the expenses of the suit and had employed the attorneys to conduct the same. The relief sought in this action, now protected by the provisional remedy of an injunction *pendente lite*, might well be rendered impossible before another action could be commenced; and this, too, because of an extraordinary injunctional order obtained by the defendants, restraining not only the parties in court by name, but all taxpayers and all abutting owners, from commencing any suit to reach the purpose of this one. The appearances attending the attempt to discontinue were such as might well arouse the suspicion of the court that the plaintiff had now colluded with the defendants to defeat the relief which he had first undertaken to pursue as a champion for others. One or another of these considerations has been given weight against applications to discontinue in the various cases cited above. One of the strongest reasons against joining the Linden Land Company as plaintiff, as an abutter, namely, that its property is not located upon the same extension as Trentlage's and not affected by the acts alleged to be imminent on First avenue, seems not to lie well in defendants' mouths, for they had by their injunctional order against all abutting owners claimed a scope for the complaint broad enough to include the Land Company.

It is not for us, however, in this summary proceeding, to decide whether the situation rendered either necessary or proper the refusal to discontinue, or the joining of the new plaintiff in the suit. We need not consider whether the complaint states any cause of action, nor, if it does, whether such cause is as taxpayer or as abutting owner, nor, if the latter,

whether it is broad enough to vindicate the rights of the Linden Land Company as such, nor whether it is properly amendable to accomplish such purpose. Neither need we consider whether the temporary injunction ought to be continued in the present situation. All of these matters were proper for judicial consideration by the superior court, and its determination upon any or all of them may readily be brought before us by appeal, for revision and correction if erroneous. We certainly find nothing in the record to suggest that the judge of the superior court has approached these questions otherwise than in a thoroughly judicial manner, that he has arbitrarily denied an order over which he had not authority to deliberate, nor, in short, that he has done otherwise than gravely and judicially consider and decide, within the field of his jurisdiction, that the plaintiff's ordinary right to discontinue his own suit cannot be exercised in the present situation without injury to rights of others which the court was bound to respect. Such action by the trial court under such circumstances does not justify the exertion of the power of superintending control.

By the Court.— The imperative writ of *mandamus* is denied.

CAWLEY, Appellant, vs. LA CROSSE CITY RAILWAY COMPANY, Respondent. 106 239 110 *159

February 28 — March 20, 1900.

(1) Stare decisis. (2, 3) *Electric street railway: Injury to person driving upon track: Duty of motorman: Contributory negligence.*

1. The rules of law declared and the conclusion drawn therefrom by this court in an action by a wife alone for personal injuries must control, on the ground of *stare decisis*, in an action by the husband to recover for the same injuries, in so far as there is substantial identity in the material facts.

2. A motorman on an electric street car has a right to expect that the driver of a carriage who is turning towards the track in front of his car will desist from so doing when warned by the gong of the car, and is not bound, as an ordinarily careful man, to exert efforts to stop his car until after it becomes apparent that the warning is unheeded.
3. One who, with her ears muffled in a fur cap and coat, drove upon and along the track of an electric street railway for the purpose of passing a wagon, without looking back along the track more than 120 feet, was guilty of contributory negligence precluding a recovery for her injuries caused by a car striking the buggy from behind.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

Action by plaintiff to recover his damages for the same injury to his wife which was under consideration in *Cawley v. La Crosse City R. Co.* 101 Wis. 145. At the close of the plaintiff's evidence the court directed a verdict for the defendant, from judgment on which plaintiff appeals.

Ray S. Reid, for the appellant.

For the respondent there was a brief by *Losey & Woodward*, and oral argument by *G. M. Woodward.*

DODGE, J. 1. The rules of law set forth in the former consideration of the events on which recovery is predicated, and the conclusion drawn therefrom, must control this case in so far as there is substantial identity in the material facts. This not upon the ground of *res adjudicata* (*Selleck v. Janesville*, 104 Wis. 570), but of *stare decisis.*

The narrative of events on which liability was predicated in the former case need not be repeated here, except so far as may become necessary for comparison. Here, as there, there was not only no direct evidence of any negligence on the part of the defendant, but there was the direct evidence of the motorman of the exercise of all usual diligence to avoid the accident after peril thereof became apparent. As in the former case, also, there was no evidence, even sug-

gested by plaintiff's counsel, from which negligence on the part of the defendant could be inferred, except that it is claimed omission of efforts by the motorman may be inferred from Mrs. Cawley's testimony tending to show that she traveled the distance requisite to pass two or three teams before she was struck by the car. On the former trial this contention was found to be so wholly overcome by other facts and circumstances that the jury could not legitimately have believed the fact to exist. One of those circumstances was that the man Bixby, whose moving woodrack and team she was attempting to pass, testified that her buggy was thrown behind his wagon. That fact is now absent, Bixby and his woodrack and team of horses have vanished, and instead thereof is a single woodrack and team driven by one John Dee, who, by the way, before the other trial had solemnly declared that he was not in the neighborhood and had no knowledge of the matter. He does not testify that the buggy fell behind his wagon, but that Mrs. Cawley's horses, at the time she was struck, were substantially even with his, and that the buggy was pushed along by the car so as to fall in front of his wagon. He does, however, testify to another fact which renders the presence of the injured woman on the track quite as brief as it need have been on Bixby's testimony, namely, that as Mrs. Cawley came trotting up to his wagon and swerved to the left to pass him he pulled up his team to allow her to do so. Thus, instead of being opposite a moving team, according to Bixby's testimony upon the former trial, she had only to pass one which was substantially stationary, and she had only gone so far in that effort as to have brought her horses alongside of his. The distance traveled after turning to the left to pass around this team could not, therefore, have exceeded fifty feet, probably not thirty, which would have occupied, at the rate of five miles an hour — a very moderate trotting speed — between seven and eight seconds. Mrs. Cawley estimates the

time at from twenty to thirty seconds, but, of course, such estimates are extremely unreliable. The car, traveling, as stated, at some fifteen miles an hour, would have traveled about 150 feet in this same length of time, and obviously no inference of negligence is to be drawn from the fact that it had not been completely stopped in that distance; the motorman being entitled to expect, first, that one turning towards the track would respond to the gong and cease such movement, and being bound, as an ordinarily careful man, to exert efforts to stop his car only after the contrary became apparent. Such proximity of the car was entirely consistent with the evidence upon the trial under consideration, while Mrs. Cawley's evidence on the former trial, albeit somewhat indefinitely, tended to deny it; she there having testified that she looked down the whole length of track, which was about 2,400 feet, and saw no car. On the last trial she testified that her glance along the track extended but a short distance,— from 75 to 120 feet. We conclude, therefore, that the evidence on this trial — all from plaintiff's witnesses — quite as fully refuted her theory of a presence on the track in front of the car long enough to pass two or three teams, and that the record is equally barren of any showing from which negligence of the defendant could have been legitimately inferred by the jury, even if there had been no direct evidence of due diligence.

Some stress is laid by appellant's counsel on the fact that the evidence now discloses that Mrs. Cawley's buggy was struck on the inside of the left hind wheel, marks of the collision being there apparent. Of this the only significance is to establish that the buggy had completely gotten onto the track before the collision. This is not in any respect different from the situation on the former trial, where Bixby testified that the left hind wheel of the buggy was between the two tracks when struck, and is in no wise inconsistent with the view taken on the former trial, and above outlined on this.

2. The contributory negligence of Mrs. Cawley, which of itself would preclude recovery, is shown even more conclusively by the present record than by the former one. The muffling of her ears with a sealskin cap and coat, so as to make any pretense of a listening a travesty, is even more fully shown; and, as before pointed out, she does not on this trial pretend to have looked down the track in the direction from which the car came any considerable distance, while on the former trial her testimony might have been understood as declaring an observation of over some 2,400 feet.

On the same grounds, therefore, which led this court to the view before that no case was presented for submission to the jury, we reach the conclusion that upon the trial now under consideration the court was right in directing a verdict for the defendant.

By the Court.—Judgment affirmed.

JOHN PAUL LUMBER COMPANY, Appellant, vs. NEUMEISTER and others, Respondents.

February 28—March 20, 1900.

Mortgages: Setting aside foreclosure sale: Inadequacy of price due to mistake: Discretion.

While mere inadequacy of price is not a sufficient ground for setting aside a foreclosure sale, such inadequacy may be considered in connection with any mistake, inadvertence, misapprehension, fraud, or misconduct which prevented persons from bidding at the sale a much larger price; and the setting aside of the sale under such circumstances, being a matter resting in the sound discretion of the trial court, will not be disturbed except for an abuse of such discretion.

APPEAL from an order of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

For the appellant there was a brief signed by *Higbee & Bunge*, and oral argument by *E. C. Higbee.*

For the respondents there was a brief by *Bleekman, Bloomingdale & Bergh* and *C. L. Hood*, and oral argument by *Mr. A. E. Bleekman* and *Mr. Hood.*

CASSODAY, C. J. This is an appeal from an order dated September 26, 1899, refusing confirmation of the sheriff's report of sale made July 29, 1899, on the judgment of foreclosure of a mortgage executed by *William Neumeister* and wife November 3, 1891, to Bertha Gessler for $3,000, entered June 11, 1898, and setting aside the sale upon condition that *Neumeister* pay $100 costs and give an undertaking, with sufficient sureties, in the sum of $7,500, conditioned that upon the resale of the mortgaged premises he would furnish a responsible bidder or bidders who would bid the amount of the judgment, with interest and costs of sale. It appears from the record that the circumstances of the parties interested in the sale, and connected with the property covered by the mortgage, are to the effect that that mortgage covered four forty-acre lots and one thirty-acre lot; that two of the forties fronted on the public highway,—one known as the "homestead forty," and the other as the "grand-stand forty," and that the other three pieces of land were immediately back of them, and only accessible to the highway over them; that January 4, 1895, *William Neumeister* and wife, in order to improve the property, borrowed $5,000 of one Frank P. Hixon, and, to secure the repayment thereof, gave him a mortgage upon the five pieces of land mentioned, subject to the Gessler mortgage, and another forty immediately back of them; that in 1897 the plaintiff, *John Paul Lumber Company*, obtained title to the grand-stand forty under lien proceedings for materials furnished in 1895–96, subject to both mortgages, and, in addition, got a large judgment for deficiency against *William Neumeister;*

that in 1897 Hixon foreclosed his mortgage mentioned, and assigned the judgment of foreclosure and sale to one William H. Tarbox, who continued to hold the same in the interest of the plaintiff, *John Paul Lumber Company;* that July 29, 1898, the plaintiff, *John Paul Lumber Company*, obtained title to the homestead forty, subject to the Gessler and Hixon mortgages, under and by virtue of a sheriff's sale on the foreclosure of a mechanic's lien upon a judgment entered May 4, 1897, for $1,773.37; that thereafter Nicholas Kaiser purchased and obtained title to the plaintiff's right and interest in the homestead forty, and paid therefor $2,100; that April 28, 1899, Kaiser sold and conveyed his interest in the homestead forty to *William Neumeister*, receiving therefor a payment of $900, and taking back a note and mortgage for $1,100; that the foreclosure judgment of the Gessler mortgage directed that the three back pieces of land should be first sold, that the grand-stand forty should be next sold, and that the homestead forty should be last sold; that *Neumeister* was dissatisfied with such order of sale, as there was no way of getting from the highway to the back pieces of land, except over the grand-stand forty, and hence that they should be sold with that forty, and so proposed to appeal from that judgment to this court; that he went so far in perfecting his appeal as to cause the court to fix the amount of the bond necessary to stay proceedings on the sale at $1,800, and executed what he supposed to be such a bond, and the same, with notice of appeal, was duly served July 28, 1898 (being the day prior to the proposed sale), but, through some inadvertence or mistake of the clerical force in the office of his attorneys, the undertaking was not conditioned to pay "any deficiency" which might arise on such sale, not exceeding the sum so fixed by the court, as required by sec. 3057, R. S. 1878; that neither he nor his attorneys learned of the mistake until after the sale had taken place, and hence they were not prepared to bid on the

sale; that he and his attorney and Nick Kaiser attended at the sale and objected to the same being made, claiming that such sale had been stayed; that in pursuance of the judgment on the Gessler mortgage the three back pieces therein described were first offered for sale, and struck off to Nick Kaiser for $3,600, but as he was unable to pay the money at the time they were resold to the plaintiff, *John Paul Lumber Company*, for $1,000; that the grand-stand forty was next offered for sale, and bid in by the plaintiff, *John Paul Lumber Company*, for $2,000; that the homestead forty was last offered for sale, and struck off to Nick Kaiser for $7,550, but, as he was unable to pay down more than $1,900, it was resold, and bid in by the plaintiff for $2,000; that out of the proceeds of such sales the sheriff paid $139 attorney's fees, and took out his own fees, $40.25, and paid the amount due for principal and interest on the Gessler foreclosure, $4,405.20, and paid the balance, of $405.20, into court. The showings of the defendants tend to prove that the grand-stand forty was worth $8,000, and that all five pieces of land covered by the Gessler mortgage, and so sold by the sheriff, were worth from $18,000 to $26,000.

As contended by the appellant, it is well settled that mere inadequacy of consideration is not a sufficient ground for setting aside a foreclosure sale. *Meehan v. Blodgett*, 86 Wis. 511. But such inadequacy of price may be considered in connection with any mistake, inadvertence, misapprehension, fraud, or misconduct which prevented persons from bidding at the sale a much larger price. *Strong v. Catton*, 1 Wis. 471; *Kemp v. Hein*, 48 Wis. 32; *Hubbard v. Taylor*, 49 Wis. 68. The granting or refusing of an application to set aside such sale and order a resale, as a matter of favor, rests in the sound discretion of the trial court; and its determination will not be disturbed, except for a clear abuse of such discretion. *Homestead L. Co. v. Joseph Schlitz B. Co.* 94 Wis. 600. Acting upon such principle, this court has

recently and repeatedly sustained orders setting aside such sales and ordering resales. *Koop v. Burris*, 95 Wis. 301; *Veit v. Meyer*, 105 Wis. 530; *Kremer v. Thwaits*, 105 Wis. 534. It is unnecessary to add anything to the discussions contained in these cases. The rights and interests of the respective parties are somewhat complicated. After careful consideration, we are all satisfied that there was no abuse of discretion in this case.

By the Court.—The order of the circuit court is affirmed.

JOHNSON, Appellant, vs. GOULT, Respondent.

February 28 — March 20, 1900.

106 247 | 107 53 | 106 247 | 109 159

Referee's findings of fact, when set aside: New trial: Newly discovered evidence: Diligence.

1. Findings of fact by a referee appointed to hear and decide the whole issue should be set aside by the trial court if they are against the clear preponderance of the evidence, even though there may be some evidence to support them. A remark in *Briggs v. Hiles*, 87 Wis. 447, that such findings have the effect of a verdict of a jury, overruled.
2. A new trial should not be granted on the ground of newly discovered evidence in the absence of a showing that diligence was used to discover and procure such evidence upon the trial.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action upon an account for moneys advanced, merchandise sold, and labor performed by the plaintiff for the defendant between the 12th day of January, 1893, and the 2d day of February, 1897. The defendant by answer denied any indebtedness, and alleged by way of counterclaim an account in his own favor against the plaintiff for money advanced and property sold to an amount exceeding the plaintiff's claim, and demanded judgment therefor.

The action was referred to a referee to hear, try, and determine; and the referee took the testimony and made findings and stated an account between the parties, by which he found that the plaintiff's credits amounted to $659.91, and the defendant's credits to $583.08, leaving a balance due the plaintiff of $76.83. The referee's findings as to the amount of the plaintiff's credits were based largely upon three receipts which were produced by the plaintiff, and which purported to be signed in pencil by the defendant; such receipts being dated October 13, 1893, April 18, 1894, and April 22, 1895, respectively, and amounting in all to $633.08. The defendant testified that he had never received the moneys supposed to be represented by these receipts, or that, if he had received any part thereof, the amounts received had been duly credited upon his account; and the defendant also claimed that said receipts were forgeries. The referee accepted the receipts as genuine, and found that the sum represented by them had in fact been advanced by the plaintiff to the defendant.

The plaintiff moved the circuit court to confirm the referee's report, and the defendant filed a motion to set the same aside and for judgment upon his counterclaim; and upon the hearing of these motions the circuit judge set aside the findings of the referee as far as the alleged payments represented by said receipts were concerned, and found that the receipts never were executed by the defendant, and adjudged that the defendant was entitled to judgment against the plaintiff for the sum of $549.30, with interest.

After the circuit court had announced its decision setting aside the report of the referee, a motion was made by the plaintiff for a new trial on the ground of newly discovered evidence; such evidence being the evidence of two witnesses, one of whom would testify that he was present when one of the alleged settlements was made between the plaintiff and the defendant, represented by one of the receipts, and

the other of whom would testify that he was present and saw the defendant sign said receipt. The motion for a new trial was overruled, and judgment entered on the findings of the circuit judge, and the plaintiff appeals.

For the appellant there were briefs by *S. A. Corning* and *W. N. Kelley*, attorneys, and *Geo. W. Bird*, of counsel, and oral argument by *Mr. Corning* and *Mr. Bird.*

For the respondent there were briefs by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park.*

WINSLOW, J. The questions which arose upon the trial of this case before the referee were purely questions of fact upon which the evidence was conflicting. The plaintiff testified to a large number of payments which he claims were made by him to the defendant during the years 1893, 1894, and 1895, amounting to more than $600, and produced three receipts evidencing such payments, which he claims the defendant signed and gave him. The defendant denied receiving such alleged payments, and testified that he never signed the receipts produced. Really, the whole controversy in the case finally was whether these alleged payments were made, and the receipts executed by the defendant. Upon this issue the referee found for the plaintiff. The circuit court, however, reversed the findings of the referee, and found that the payments had never been made and that the receipts were forgeries; and the question arising on this appeal is whether such findings of the trial court shall be sustained.

The principle of law frequently stated in the decisions of this court is that the findings of a referee upon conflicting evidence should not be set aside by the trial court unless they are against the clear preponderance of the evidence. They are entitled to the same credit in the trial court that the findings of the trial court possess in this court. *Zoesch v. Thielman*, 105 Wis. 117; *Leasia v. Penokee L. Co.* 103 Wis.

304. This is the rule uniformly applied by this court for many years to the findings made by referees appointed to hear and decide the whole issue.

While it has been held in some jurisdictions that the findings of fact of a referee have the effect of the verdict of a jury, such has not been the rule in this court, although language to that effect was used in the course of the opinion in the case of *Briggs v. Hiles*, 87 Wis. 438, 447. That case, however, was one where the referee's findings of fact were held to be supported by the clear preponderance of the evidence, hence it was unnecessary to consider the extreme limit of the weight due to such findings, or to decide that they would be affirmed if there was "*any* evidence to support them." It seems manifestly illogical to hold that a mere referee's finding of fact have greater weight and dignity than the findings of a circuit judge who tries the issues and finds the facts himself.

Prior to the decision of the last-cited case, the rule was established as first stated in this opinion, and in one case in an opinion by the same justice who wrote the opinion in *Briggs v. Hiles*. See *Walker v. Newton*, 53 Wis. 336; *La Coursier v. Russell*, 82 Wis. 265. That there was no intention to overturn or change this rule in *Briggs v. Hiles* is apparent, because these cases are nowhere referred to in the opinion. Since the decision in *Briggs v. Hiles* there have been a number of cases in which the effect of the findings of a referee appointed to hear and decide the whole issue was necessarily considered, and in all of these cases the rule has been stated and applied that such findings are to be affirmed unless they are against the clear preponderance of the evidence, in which latter case they are to be reversed, even though there may be some evidence to support them. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214; *Hinz v. Van Dusen*, 95 Wis. 503; *Leasia v. Penokee L. Co.* 103 Wis. 304; *Zoesch v. Thielman*, 105 Wis. 117. The effect of

these cases is practically to overrule the remark above referred to in the case of *Briggs v. Hiles*, and it must be so considered. We have not overlooked the last clause of sec. 2865, Stats. 1898, which provides, "When the reference is to report the facts the report shall have the effect of a special verdict." This clause has existed in the same words and connection ever since the adoption of the Code (sec. 182, ch. 120, Laws of 1856), and it must be considered as definitely construed by the cases above cited, all of which were decided during the existence of the provision.

Coming to the facts of the present case, we think, after careful examination of the evidence, that the circuit judge was justified in concluding that the referee's findings upon the question of the advancing of moneys by plaintiff to defendant, and the execution of the receipts in question by the defendant, were contrary to the clear preponderance of the evidence. The improbability of the plaintiff's acquiring such sums from any means of revenue which he was shown to have seems very great. The receipts seem suspicious upon their face. Witnesses familiar with defendant's handwriting denied that the signatures were genuine. The plaintiff's veracity was impeached. And, in addition to these facts, it must be remembered that the circuit judge, even though the testimony was taken by a referee, doubtless had means and opportunities, not possessed by us, which enabled him to appreciate more justly the character and intelligence of the parties and their witnesses, and aided him in determining the weight of the evidence. *Ely v. Daily*, 40 Wis. 52.

The only other question in the case arises upon the motion for new trial upon the ground of newly discovered evidence. The argument that such newly discovered evidence was cumulative merely is quite strong; but, however this may be, there is a fatal defect in the moving papers, which must result in affirmance of the order. It was not shown, even by a general allegation in the affidavits, that any diligence

had been used in attempting to discover and procure such evidence upon the trial. This is an essential allegation. New trials on the ground of newly discovered evidence are not granted in its absence.

By the Court.—Judgment affirmed.

CONRAD, Respondent, vs. KELLEY, Assignee, Appellant.

February 28—March 20, 1900.

Replevin: Sale or consignment for sale? Court and jury.

1. In replevin for goods which had been shipped by plaintiff to defendant's assignor, the question whether they had been sold to said assignor or merely consigned to him for sale as plaintiff's agent is *held*, on the evidence, to have been one for the jury.
2. The jury should not be required to determine a fact as to which there is no evidence whatever, except as an inference in respect thereto might be drawn, after the determination of the real issue, from the facts then found.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Reversed.*

Action of replevin to recover a quantity of cigars. The question at issue was whether a transaction between plaintiff and defendant's assignor, Carr, regarding some cigars, was a sale to the latter or a consignment of property to him to be sold on plaintiff's account.

The testimony of Macdonald, who did the business for plaintiff, omitting his conclusions, is in substance as follows: 'I said to Carr, I have some cigars I would like to call your attention to. He said he did not wish to buy. I said, I will ship the cigars and you can pay each time I come around for what you have sold. I said, I will send a memorandum from the house, of the goods, at such and such a figure, and you can turn over to me each time I come $33 per thousand for

the amount sold. I will pay the freight if you do not realize enough to do so, and you may send the goods back any time if they do not sell well or are in the way, and I will take them back if they do not sell satisfactory to me. I do not want you to buy anything or to sell to you anything. I just ask you to display the goods and sell them for the house. They will belong to the house all the time. All you have to do is to give us our end of what is disposed of.'

Carr testified, regarding the conversation with Macdonald, in substance as follows: 'Macdonald said he wanted to sell me some cigars. I said, I do not want any. He said, If you will take twenty-five hundred I will make the terms $33 per thousand, payable every sixty days when I come around, for what you have sold. I said, You can ship them. He thanked me for the order and went out. Nothing was said by Macdonald about the goods belonging to plaintiff till sold or a bill or memorandum being sent, or my paying plaintiff his end and keeping mine, or that he did not want me to buy the cigars, that he wanted me to put them on sale at my store. He said, I will take the cigars back if you wish me to, if they do not sell satisfactory. I was to have the right to return them. I was not to pay for them if they did not sell. I assumed no obligation except to pay $33 per thousand for the cigars sold.'

The cigars were billed in manner following:

"St. Paul, Minn., Dec. 20, 1897.

"G. T. Carr, Menomonie, Wis.

Bought of W. S. Conrad,

Importers and Jobbers of Fine Cigars,

Terms: 341 Jackson St.

2,500 'Stag Party' Cigars, $33. $82.50."

The court submitted to the jury to find whether the agreement was that the cigars should be paid for out of the money received for them when sold by Carr. The finding was in the affirmative. Upon the evidence and the fact so

found, the court decided that the transaction between Carr and plaintiff's agent was an agreement for a consignment of cigars to the former, to be sold on plaintiff's account; that no property interest in the cigars, conditional or otherwise, ever passed to Carr; and that plaintiff was entitled to judgment for the property in controversy,— the cigars in Carr's possession unsold at the time he made an assignment to the defendant for the benefit of creditors, and that were delivered to the defendant under such assignment. The defendant appealed.

For the appellant there was a brief by *E. B. & R. E. Bundy*, and oral argument by *R. E. Bundy*.

J. R. Mathews, for the respondent.

MARSHALL, J. If the transaction between the plaintiff, through his agent Macdonald, and Carr was a sale conditional or otherwise, defendant, as assignee of the latter for the benefit of his creditors, was entitled to recover. *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627. Otherwise, plaintiff was entitled to recover.

It is contended by appellant's counsel that there was no evidence tending to establish the proposition that the cigars were consigned to Carr to be sold on respondent's account as claimed by him, and that the cause should have been taken from the jury in his favor. The record does not bear out that view. The evidence of Macdonald tends strongly to show that Carr was the agent of plaintiff, not his vendee, while the evidence of Carr is reasonably susceptible of a contrary inference and is supported by the circumstance,— not conclusive it is true,— that the goods were billed to him as vendee. In that situation, certainly, the case, as to the facts in issue, should have been determined by the jury under proper instructions.

It is further contended by appellant's counsel that the court erred in submitting to the jury, as the only fact in

dispute, whether the understanding between the parties was that the cigars should be paid for out of the identical money received therefor by Carr. The assignment of error in that regard must be sustained. The evidence, as it seems, did not warrant the submission of that question as the turning point in the case. There was no evidence to warrant the conclusion reached by the jury, that there was an understanding that plaintiff should receive $33 per thousand for cigars sold by Carr out of the money received by him. Neither Carr nor Macdonald testified to any such agreement or understanding, and there was no fact or circumstance testified to from which such an understanding could be reasonably inferred, except the fact in issue as to whether the cigars were merely consigned to Carr for sale as plaintiff's agent. The controversy as to such fact, under proper instructions, should have been submitted to the jury.

A jury may determine the existence of evidentiary facts from evidence more or less directly establishing them, and follow the reasonable inferences from such facts to a conclusion as to the ultimate issue to be decided by them, but should not be required to determine a fact respecting which there is no evidence whatever, except what lies beyond the issuable facts and does not really exist at all so as to be taken note of in any rational process of reasoning, till such issues are determined.

If there had been some evidence directly bearing on the question of whether the cigars were to be paid for out of the money received for them by Carr, it would have been proper to have directed the jury to determine the truth in that regard, because if payments were to be so made that circumstance would point to the existence of a mere agency contract between plaintiff and Carr, though not necessarily conclusive. The difficulty, however, reached by the error assigned regarding the manner in which the case was submitted to the jury, is that there was no evidence bearing on

the question. The real controverted question of fact, in respect to which there was evidence reasonably susceptible of a finding either way, was decided by the court as a question of law, and for that reason the judgment must be reversed and the cause remanded for a new trial.

By the Court.— So ordered.

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FINNEY, Receiver, and others, Respondents, vs. GUY, Appellant.

March 1 — March 20, 1900.

Statutory rights and remedies: Interstate comity: Foreign corporations: Statutory liability of stockholders: Ancillary actions: Parties.

1. Where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction.
2. Although an action to enforce a liability created by statute in one state is transitory, no exclusive remedy having been provided, yet the enforcement of such liability in another state is dependent on the rule of comity.
3. The rule of interstate comity does not require the courts of one state to enforce rights dependent upon the laws of another state if such laws contravene the policy of the state whose jurisdiction is invoked or subject its citizens to serious inconvenience or injustice.
4. The statutory liability of stockholders of a bank to its creditors is of precisely the same nature under the laws of Minnesota as under the laws of this state, and the statutes of that state (Gen. Stats. Minn. secs. 5905, 5906) providing a remedy for its enforcement are similar to ours (Stats. 1898, secs. 3223, 3224). As construed by our courts and by the earlier decisions in Minnesota, the remedy so provided is exclusive and requires a single equitable action to be brought in the home jurisdiction in behalf of all the creditors and against all the stockholders within that jurisdiction, and that all the rights, equities, and liabilities of the parties shall be finally settled and determined therein; but in a later case the supreme court of Minnesota has decided that the statutory remedy does not preclude ancillary actions, either in the home or other jurisdictions, to

reach stockholders who could not be reached in the first instance, and, upon the theory that they are represented in the original action by the corporation, that such stockholders are bound in the ancillary action by the determination in the original action of all questions necessarily there litigated. *Held*, that such decision is so out of harmony with the previously established doctrine in that state and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality of remedies, and of the right of every person to his day in court as to every material question involving his interest, as well as so contrary to the policy of the law of this state, that effect should not be given to its doctrine by the courts of this state, under the rule of comity, as against a Wisconsin stockholder in a Minnesota bank whose liability as such accrued prior to said decision.

5. In an action to enforce the statutory liability of the stockholders of a corporation to its creditors the corporation itself is not a necessary party unless there are corporate assets to be reached. If made a party, it does not in any sense represent absent stockholders so as to make the judgment binding upon them.

DODGE, J., dissents.

APPEAL from an order of the circuit court for Pierce county: A. J. VINJE, Judge. *Reversed.*

Action to enforce the statutory liability of a stockholder of a bank to creditors under the laws of Minnesota.

The complaint stated, in effect, as follows: The Farmers' & Merchants' State Bank, a banking corporation organized under the laws of and located in the state of Minnesota and there engaged in business from June 6, 1888, till June 20, 1893, on the last-named date, pursuant to the laws of such state, made an assignment for the benefit of its creditors, which assignment was fully perfected, and such proceedings were thereafter had in administering it that the assets of the bank were converted into money and the net proceeds thereof distributed to the creditors, without paying them in full by about $80,000. The capital stock of the bank was $75,000. Each individual stockholder was named in the complaint, with the amount of stock owned by him, defendant, *Mary A. Guy*, being one of such stockholders and said to be the

owner of nineteen shares of the par value of $100 each. She resides in Pierce county, Wisconsin.

It was further alleged in the complaint, in effect, that by the laws of the state of Minnesota every person, on becoming a stockholder of a bank organized under its laws, in proportion to his interest, succeeds to the rights and becomes subject to the liabilities of his predecessor, and that the individual liabilities of stockholders to its creditors extends to double the amount of the stock and continues, as to any stockholder who may sell or transfer his stock, till the expiration of one year after such sale or transfer; that a creditor of a bank, desiring to enforce the individual liability of its stockholders for the payment of his claim, may file his complaint in an action instituted for that purpose in any court in Minnesota having jurisdiction of the subject, and that thereupon such court is required to proceed "as in other cases, and when necessary to cause an account to be taken of the property and debts due to and from the corporation, and appoint one or more receivers;" that there is a provision of statute, however, that in certain circumstances therein named the court may proceed to enforce the stockholders' liability without appointing a receiver and by its judgment as in other cases. The complaint further stated, in effect, that the statutes of Minnesota provide that in a creditors' action to enforce the statutory liabilities of bank stockholders the court may require all the creditors of the bank to become parties to the action and exhibit their claims within a reasonable time fixed by the court, not less than six months from the date of the first publication of the order to that effect, or be barred from all the benefits of such liabilities.

The complaint further stated, in effect, that according to the judicial system established in Minnesota by its highest judicial tribunal (citing the various cases that have been decided by such tribunal), the liability of stockholders of a bank organized under the laws of that state, to its creditors,

must be enforced by first instituting an action, at the domicile of the corporation, against the corporation and all of its stockholders within the jurisdiction of the court, on behalf of all creditors of such corporation who shall participate in the action; that the proper method of proceeding in the action is to cause a judgment to be rendered in favor of each creditor for the amount owing him from the bank, and a judgment against each stockholder over whom the court shall have been able to obtain jurisdiction for the maximum amount of his liability, and to enforce the judgment as to such liabilities *pro rata*, as far as practicable, in order to realize a sufficient amount of money to pay all indebtedness of the bank established in the action to the extent of the full amount of such liabilities, and to cause a receiver to be appointed in the action to collect the judgments and distribute the proceeds and to enforce the liabilities of other stockholders residing in jurisdictions outside of that in which the judgment is rendered. Further, it was stated to be the law of Minnesota, as held by its highest judicial tribunal, and as indicated in the adjudications mentioned, that the statutory liability of stockholders is several and that a judgment against a part of them does not release others against whom no judgment is or can be rendered in the action; that if any of the stockholders are omitted from the first action because the court cannot acquire jurisdiction of them for any cause, an action ancillary to such first action, in any jurisdiction in which such stockholders may be found, may be brought; that an action to enforce such a liability is upon contract; that the judgment in the original action is binding on all stockholders, whether parties thereto or not, as to the amount due to creditors of the bank, and on all creditors entitled to the benefits of the stockholders' liability to creditors, and as to the respective rights of the particular creditors; that a stockholder of a bank organized under the laws of Minnesota, wherever he may reside, is bound by its laws, and his

liability in accordance therewith may be enforced wherever he may be found and without any judgment there obtained against the corporation, if it be a place where no such judgment is possible.

The complaint further alleged, in effect, that in January, 1894, an action was commenced, in a district court for the state of Minnesota having jurisdiction of the subject, against the banking corporation named and its stockholders, by a creditor of such bank, suing in his own behalf and that of all others who might come in and participate in the action, to enforce the liability of such stockholders to such creditors, and that such proceedings were thereafter had in such action that the amount of the indebtedness of the bank was adjudicated according to the laws and judicial system of Minnesota, and that the total amount collectible from all the stockholders of the bank, aside from the defendant, has been judicially determined to be, and in fact is, less than sufficient to pay such indebtedness by over $80,000; that defendant, being a nonresident stockholder, residing in Pierce county, Wisconsin, could not be reached in such action, and that she is liable to the creditors entitled to participate in the benefits of the stockholders' liability to the extent of $3,800, with interest thereon from April 28, 1897. There were further allegations in the complaint showing that the receiver appointed in the creditors' action at the domicile of the corporation, and all the creditors whose claims were established in such action and entitled to participate in the benefits of the stockholders' liability, are joined as plaintiffs in this action, that they came to this state after having exhausted all remedies at the domicile of the corporation for the satisfaction of their claims, that they instituted this action against the defendant stockholder in this state because she could not be reached in the original action, and that this action is ancillary to the action brought at the home of the corporation.

The prayer for judgment is: (1) That defendant be required to pay $3,800 as her liability to plaintiffs, with interest from April 28, 1897, at the rate of seven per cent. per annum, with costs and disbursements, and that plaintiffs have execution therefor. (2) That plaintiff *A. C. Finney* be appointed receiver to collect the judgment and distribute the proceeds among the plaintiffs according to their respective rights in the fund. (3) That the court award such further judgment or order as may be necessary to enforce such liability of the defendant, and grant such further relief as the court can grant in the premises.

To that complaint the defendant interposed a demurrer upon the ground, among others, that it fails to state facts sufficient to constitute a cause of action. The demurrer was overruled, and from the order accordingly entered this appeal is taken.

J. W. Bashford, attorney, and *R. M. Bashford*, of counsel, for the appellant, to the point that the action could not be maintained, cited, besides cases cited in the opinion, *Faribault v. Misener*, 20 Minn. 396; Sedgwick, Stat. & Const. Law (2d ed.), 344; *Lowry v. Inman*, 46 N. Y. 119; *Nat. Bank v. Dillingham*, 147 N. Y. 603; *Post & Co. v. T., C. & St. L. R. Co.* 144 Mass. 341; *Fowler v. Lamson*, 146 Ill. 472; *Young v. Farwell*, 139 Ill. 326; *Hancock Nat. Bank v. Farnum*, 20 R. I 466; *Ferguson v. Sherman*, 116 Cal. 169; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Crippen v. Laighton*, 44 Atl. Rep. 538; *Stoddard v. Lum*, 159 N. Y. 265; 12 Ency. of Pl. & Pr. 141; 34 L. R. A. 752, 754, 763, 766.

For the respondents there was a brief by *F. M. White* and *Fred. W. Reed*, and oral argument by *Mr. Reed*. They contended, *inter alia*, that the statutory liability of stockholders to creditors is a substantive right of action arising on contract. *Bagley v. Tyler*, 43 Mo. App. 195, 202; *Dennis v. Superior Court*, 91 Cal. 548; *Hodgson v. Cheever*, 8 Mo. App.

318, 321; *Guerney v. Moore*, 131 Mo. 650, 672, 673; *Tinker v. Van Dyke*, 1 Flip. 521, 532; *Hobart v. Johnson*, 19 Blatch. 359, 361; *Flash v. Conn*, 109 U. S. 371; *Western Nat. Bank v. Lawrence*, 117 Mich. 669; Morawetz, Priv. Corp. §§ 870, 875; Thomp. Corp. §§ 3056, 3059; Cook, Stock, § 223; *Bell v. Farwell*, 176 Ill. 489; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39; *First Nat. Bank v. Gustin Minerva C. M. Co.* 42 Minn. 327; *Hencke v. Twomey*, 58 Minn. 550; *Hanson v. Davison*, 73 Minn. 454; *Coleman v. White*, 14 Wis. 700; *Merchants' Bank v. Chandler*, 19 Wis. 435; *Gianella v. Bigelow*, 96 Wis. 185, 194; *Williams v. Meloy*, 97 Wis. 561, 564. A right of action arising on a statute is just as enforceable in another state as a right of action under the common law. *Dennick v. Railroad Co.* 103 U. S. 11; *Bigelow v. Nickerson*, 70 Fed. Rep. 114; *Greaves v. Neal*, 57 Fed. Rep. 816. The principles applied in those cases apply with equal force to the statutes enacting liability of stockholders. The courts go so far as to say that an action for their enforcement is not entertained because of the comity of states, but because of the willingness of the court to enforce a valid contract. *Bell v. Farwell*, 176 Ill. 489; *Western Nat. Bank v. Reckless*, 96 Fed. Rep. 70; *Lowry v. Inman*, 46 N. Y. 119. This action, then, is really one to enforce a valid contract, as much so as if it were a promissory note made in the state of Minnesota. And to refuse to entertain it is a refusal to enforce a contract simply because it was made in another state and to refuse to recognize the validity of a solemn and just contract. The doctrine of comity is applicable to a cause of action arising on the statute of another state. *Northern P. R. Co. v. Mase*, 63 Fed. Rep. 114; *Herrick v. M. & St. L. R. Co.* 31 Minn. 11; *Northern P. R. Co. v. Babcock*, 154 U. S. 190; *Midland Co. v. Broat*, 50 Minn. 562, 567. The principle applies with equal force in actions to enforce the statutory liability of stockholders. *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Bagley v. Tyler*, 43 Mo. App. 195; *Auer v. Lombard*,

72 Fed. Rep. 209. This action is ancillary to the decree entered in the Minnesota court; the proceedings there had are binding on the stockholders everywhere; and to refuse to maintain this action is to refuse to give due faith and credit to the judgment of a sister state. *Harmon v. Hunt*, 116 N. C. 678; *Baltimore & O. R. Co. v. Smith*, 54 Ohio St. 562, 564; *Guerney v. Moore*, 131 Mo. 650; *Merchants' Nat. Bank v. Chandler*, 19 Wis. 434; *Powell v. Oregonian R. Co.* 38 Fed. Rep. 187; *Stephens v. Fox*, 83 N. Y. 313; *Alexander v. Donohoe*, 143 N. Y. 203; *Howard v. Glenn*, 85 Ga. 238; *Great Western T. Co. v. Gray*, 122 Ill. 630; *Hawkins v. Glenn*, 131 U. S. 319, 329, 332; *Glenn v. Liggett*, 135 U. S. 533; *Nichols v. Stevens*, 123 Mo. 96; *Holland v. Duluth I. M. & D. Co.* 65 Minn. 324, 331; *Hanson v. Davison*, 73 Minn. 454; *Hale v. Hardon*, 95 Fed. Rep. 747; *Huntington v. Attrill*, 146 U. S. 657; *Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.* 71 Fed. Rep. 826; *Central T. Co. v. C., C. & A. R. Co.* 65 Fed. Rep. 257.

MARSHALL, J. As we view this case, the disposition of the question of whether the complaint states facts sufficient to constitute a cause of action against the defendant is decisive of the appeal. Some of the primary questions, upon which the ultimate question turns, are not free from difficulty.

The nature of the statutory liability of stockholders of a bank to its creditors under the laws of Minnesota is precisely the same as under the laws of this state, according to the adjudications of the highest judicial tribunal in each. Sec. 2501 of the Minnesota statutes says that each stockholder in a bank shall be individually liable, in an amount equal to double the amount of stock held by him, for all the debts of such bank. Sec. 47 of the banking act of this state [Stats. 1898, p. 1537] provides that stockholders in a bank organized under the laws of this state, shall be indi-

vidually responsible, to the amount of their respective shares of stock, for all its debts and liabilities of every kind. In *Coleman v. White*, 14 Wis. 700, it was said, in substance, that such liability is primary and absolute, attaching at the instant the liability of the bank accrues, but enforceable on a basis akin to that of a partnership liability, with the limitation fixed by statute of the par value of the stock held by each stockholder. To the same effect are *Gianella v. Bigelow*, 96 Wis. 185; *Booth v. Dear*, 96 Wis. 516; *Gager v. Marsden*, 101 Wis. 598; *Foster v. Posson*, 105 Wis. 99,—in which cases adjudications of the Minnesota court are cited as authority. The supreme court of Minnesota has decided that the liability is several of each stockholder to all the creditors, but joint in the sense that there must be one action in which all the liabilities of all the stockholders to all the creditors, and the equities of the stockholders between themselves, can be worked out. That is, in effect as stated by this court, that the liability of the stockholders is akin to that of partners, with a limitation as to extent thereof fixed by the statute. *Allen v. Walsh*, 25 Minn. 543; *Arthur v. Willius*, 44 Minn. 409; *Harper v. Carroll*, 66 Minn. 487; *Hanson v. Davison*, 73 Minn. 454.

While the Minnesota court, in the two cases last cited, said that the liability is several, not joint, it is evident that the expression was not intended in a strict legal sense, for it was there distinctly held that, in respect to the manner the liability must necessarily be worked out, it is joint in that all the creditors participating must appear on one side of the controversy, and all the stockholders charged, within the jurisdiction of the court, must appear on the other. The courts of the two states are in perfect harmony in that an action at law, as an original proceeding at least, cannot be brought in any jurisdiction by a single or any number of creditors against a single or any number of stockholders and that the liability, in view of the manner in which it must

be worked out, is nearer to that of partners to creditors of a partnership than to any other with which it can be compared, as was said by DIXON, C. J., in *Coleman v. White.*

The Minnesota statutes (Gen. Stats. secs. 5905, 5906) provide a remedy for the enforcement of the statutory liability of stockholders to creditors similar in all respects to that indicated by the statutes of this state on the same subject: secs. 3223, 3224, Stats. 1898. The courts in both states have held that the plain legislative purpose was to furnish, by the statutes referred to, a method for the enforcement of the statutory liability of stockholders, and that it requires one action in equity, in favor of all creditors, against all stockholders within the jurisdiction of the court, and against the corporation if there are corporate assets to be reached. *Coleman v. White*, *Gianella v. Bigelow*, and *Booth v. Dear*, *supra* (Wisconsin); *Allen v. Walsh*, *Arthur v. Willius*, *supra* (Minnesota). Both courts have said that the remedy plainly indicated by the legislature, for the enforcement of the liability, is inseparably connected with it and is exclusive. *Allen v. Walsh*, *Foster v. Posson*, *supra.* In regard to this last branch of the subject, it is claimed by the respondents that the doctrine of *Allen v. Walsh* has been to some extent changed, and that will be considered later.

If we could rest the case at this point there would be no question but that the complaint is fatally defective. Unless the suggested modification of the doctrine of *Allen v. Walsh* in Minnesota requires a different result, such must be the decision, for two reasons: (1) The statutory right, coupled with the statutory remedy for its enforcement, clearly intended to be pursued at the home of the corporation, is not transitory. (2) The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders.

It is elementary that while a statutory remedy, not in terms exclusive, for the enforcement of a common-law right is cumulative, and that a statutory right, in the absence of

a remedy to enforce it, may be made available by some one of the ordinary remedies for the redress of wrongs, a statutory remedy, not by its terms cumulative, to enforce a statutory right is exclusive. 1 Am. & Eng. Ency. of Law, 184*e*. The ultimate question under consideration at this point, as appellant's counsel suggests, was definitely passed upon in *May v. Black*, 77 Wis. 101, where it was said that a statutory right, coupled with a remedy to make it effective, is enforceable only within the jurisdiction of its creation, and the statutory remedy is exclusive. Numerous cases are cited to support that doctrine, among them: *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Rocky Mountain Bank v. Bliss*, 89 N. Y. 338; *Christensen v. Eno*, 106 N. Y. 97; *Nimick v. Mingo I. W. Co.* 25 W. Va. 184; *Patterson v. Lynde*, 112 Ill. 196. For further cases on the subject, see *Huntington v. Attrill*, 146 U. S. 657; *New Haven H. N. Co. v. Linden Spring Co.* 142 Mass. 349; *Bank of N. A. v. Rindge*, 154 Mass. 203. The subject was fully discussed in *Pollard v. Bailey*, *supra*, and the decision there reached has been followed without exception in the federal supreme court. WAITE, C. J., speaking for the court, said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of the statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation and provide the manner of its enforcement. Here the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by a statute, without a remedy, may be enforced by a proper common-law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed." So, in *Erickson v. Nesmith*, 4 Allen, 233, it was said: "A creditor of a corporation established in New Hampshire, the stockholders of which are individually lia-

ble for its debts under the statutes of that state, cannot maintain a bill in equity to enforce his claims against the stockholders in Massachusetts, although some of them live here." In *Marshall v. Sherman*, 148 N. Y. 9, after an exhaustive review of decisions on the subject, it was said, in substance, 'that while it is not easy to state with exactness the principle upon which the courts of one state will not take jurisdiction of an action to enforce against one of its citizens a stockholder's liability under the laws of another state, the great weight of authority is against the maintenance of such an action.' The case of *May v. Black*, 77 Wis. 101, is there cited as one of the significant instances where the law has been so declared.

It is useless to pursue this subject further. There was little use of saying more in regard to it than to state the law as indicated and refer to the decisions of our own state establishing it as the prevailing rule here. Our attention is called to some recent adjudications which are said to conflict with the rule that a statutory liability of stockholders to creditors will not be enforced outside the jurisdiction of the state creating it, which, though in point as to the abstract question, are not as applied to the facts of this case.

One of the most significant cases referred to is *Hancock Nat. Bank v. Ellis*, 172 Mass. 39. It differs from *Marshall v. Sherman*, 148 N. Y. 9, in that it holds that the statutory liability of stockholders under the Kansas statute can be enforced in a foreign jurisdiction, solely upon the ground, however, that the law of Kansas does not furnish an exclusive remedy to enforce the right, according as such law is construed in the home jurisdiction; that every stockholder is thus liable in an action at law to the first creditor who pursues him, in any court where service can be made upon him, till he has paid the full amount of his statutory liability, such liability being treated as in every sense several and on contract, so that the remedy of a creditor to enforce it

can as well be pursued in one jurisdiction as another; and that under such circumstances a foreign jurisdiction should lend its aid to creditors against stockholders within its reach if thereby no serious inconvenience or injustice will be inflicted upon its own citizens. Turning to those statutes coupling a right with a remedy against stockholders, the court said: "This court has many times decided that the statutes of other states, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all stockholders are to be made parties, will not in general be enforced by the courts of this state; the special remedy provided by the statute must be pursued, and as the statutes of a state have no force *ex proprio vigore* beyond the territorial limits of the state, the remedy usually must be pursued in the state where the corporation has been established and the statute passed." Citing numerous cases in that and other courts, including *May v. Black*, 77 Wis. 101. The court, having come to the conclusion that the cause of action under the Kansas statute was transitory, tested the question of whether courts of Massachusetts should take jurisdiction to enforce it by the general principles governing the conduct of courts in enforcing rights dependent upon foreign laws, which principles, other than such as relate to penal statutes, were stated, in substance, as follows: the foreign law must not contravene the policy of the state whose jurisdiction is invoked, or be contrary to public morals or abstract justice, or be calculated to injure the state or its citizens; the jurisdiction invoked must be able to reach all the parties affected by the litigation, so as to do complete justice between them, and it must be able to attain that end consistent with its own forms of procedure. Testing the situation before the court by such principles, it was concluded that the enforcement, in the courts of Massachusetts, of the statutory liability of a stockholder, resident in that state, of a Kansas banking corpora-

tion, does no injustice to such stockholder, because, if he be compelled to pay, he has the same right to pursue his associate stockholders for contribution as if he were a citizen of, and compelled to respond to creditors in, Kansas; that the difficulties are no greater in the one case than in the other; that whatever difficulties exist, they were created by the Kansas statute, which permits individual actions at law against stockholders wherever they may be found, which law entered into the stockholder's contract with the corporation and its creditors when he became a member of such corporation.

So it will be seen that the Massachusetts case, confidently relied upon by the respondents, does not militate at all against the doctrine that a statutory right, dependent in the home jurisdiction upon a statutory remedy, must be enforced in such jurisdiction or not at all, nor against the doctrine that a statutory right cannot be enforced in a foreign jurisdiction unless all the necessary parties to an action of that kind are before the court, nor if its enforcement will violate the policy or will subject the citizens of the foreign jurisdiction to serious inconvenience or injustice. It was principally on the latter ground that the New York court, in *Marshall v. Sherman*, 148 N. Y. 9, declined to take jurisdiction.

Another case confidently referred to is *Western Nat. Bank v. Lawrence*, 117 Mich. 669. The action was to enforce a statutory liability created by the Kansas statute, and jurisdiction was taken for the same reason as that stated by the Massachusetts court in the case before referred to, that is, upon the sole ground that the liability under the Kansas statute, as construed by its court, is enforceable by an action against any stockholder as an ordinary liability on contract, till such stockholder shall have paid to creditors the full amount for which he is responsible; that the action is transitory and should be enforced in all jurisdictions the same as other actions on contract, that can be as well enforced in

one jurisdiction as in another, and where there is no good reason why the foreign court should not lend its aid to the enforcement of the right. True, the Michigan court made the extraordinary statement that the right to maintain a suit to enforce a statutory right under the Kansas statute in Michigan does not depend upon the law of comity. That was unnecessary to the decision. It is directly contrary to *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, and, as it seems, to elementary principles. In all cases where a court is called upon to give effect to a right dependent upon a foreign statute, it involves the enforcement of a foreign law and its action in that regard depends upon the rule of comity. That, as it seems, is too clear for reasonable controversy.

Neither *Hancock Nat. Bank v. Ellis*, *Western Nat. Bank v. Lawrence*, *Bell v. Farwell*, 176 Ill. 489, nor any other of the numerous cases that might be referred to regarding the enforcement of the statutory liability of stockholders to creditors, created by the Kansas statute, and statutes of other states creating a several liability of stockholders to creditors, in the sense that each stockholder is made liable directly to each creditor and may be made to respond accordingly in an action at law against him alone wherever he may be found, have any significance in determining the right of creditors in a foreign jurisdiction under statutes like that of Minnesota and this state, which plainly require the equities of all stockholders as between themselves to be worked out in a single action in equity at the home of the corporation, and the contributions of all stockholders accumulated in the action to be treated as one fund, to be administered for the benefit of all creditors in proportion to the respective claims against the corporation as established in such action, to which such corporation is a necessary party if there are corporate assets to be reached, and a proper party in respect to the issue regarding the indebtedness for which stockholders may be held liable. By a moment's con-

sideration of the distinction between the two statutory systems, represented by the Kansas statute and the statute of Minnesota, it will be seen that the remedial processes that will effect the purposes of one are entirely unadapted to the other. A failure to keep such distinction in mind has led textwriters and courts into the error of supposing that the decisions in regard to one of such systems are in conflict with those in regard to the other.

It is contended that, admitting the rule above discussed — that where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction, as indicated in *May v. Black*, 77 Wis. 101,—it does not apply here, because we are dealing with a Minnesota law and the supreme court of that state, in *Hanson v. Davison*, 73 Minn. 454, has decided that the statutory remedy given there to enforce the liability under consideration is only exclusive so far as it goes; that it requires an original action by a creditor or creditors in behalf of all persons so circumstanced who shall come into the action, against all the stockholders of the bank within the jurisdiction of the court, and that the liabilities of all such stockholders must be there enforced, and the indebtedness of the corporation forming the basis therefor and for any action that may thereafter be brought in aid of the statutory action determined; that the statutory remedy does not preclude the institution and prosecution of ancillary actions to reach stockholders, either in the home or other jurisdictions, that cannot be reached in the first instance, and that such stockholders by such actions may be pursued in any jurisdiction in Minnesota where they can be found, and in any foreign jurisdiction where the court will permit it.

Such is the state of the law as it now exists in Minnesota. It is a wide departure from the doctrine announced in *Allen v. Walsh*, 25 Minn. 543, where the statutes governing the subject were carefully and plainly construed, which construc-

tion, for a period of some twenty years, covering that within which the liability in question accrued, was the settled law of the state. In the early case it was said that the statute prescribes a single action in equity, in which the liability of all stockholders to all creditors and the equities between the stockholders must be worked out or not at all. There is no room to mistake what the court intended in that case. The following language was used: "It is reasonable to suppose that the legislature intended by those sections [referring to the sections set forth in the complaint here] to provide an efficient and sole remedy for enforcing payment of the debts of an insolvent corporation out of the individual liability of its stockholders, for the rule is well settled that where a statute which creates a right also prescribes an adequate remedy the latter is to be taken as the exclusive one; that the chapter which gives this remedy forms a part of the General Statutes, which were adopted in 1866 and which contain the enactment that creates the statutory liability, and therefore the rule referred to is fairly applicable. It is shown, from an examination of these sections, that the remedy they provide contemplates a single action, in which all persons having or claiming any interest in the said action shall be joined or properly represented and their rights, equities, and liabilities finally settled and determined."

We might easily, but it would draw this opinion out to an unnecessary length, refer to the decisions that followed *Allen v. Walsh* down to *Hanson v. Davison* and show that the plain language of the early case was taken and applied in every instance in its literal sense.

In view of the foregoing we read with some surprise the statement of the court in the *Hanson Case* that the doctrine of *Allen v. Walsh* does not go so far as to preclude the institution and prosecution of an action ancillary to the principal action against those who cannot be brought in in the first instance. The reason of the later decision does not appeal

very strongly to our judicial judgment. It starts out by overturning twenty years of established law at home and runs counter to the decisions of this and all other states where similar laws exist. While admitting that the Minnesota statute gives a specific remedy for the enforcement of the right under consideration, and that in pursuing such remedy the corporation may be a necessary party, and that such remedy must be pursued at the home of the corporation, the court not only ignores, as it seems, the law of the state long and firmly established, and that elsewhere, as indicated, but ignores the principle, of universal application, that a remedy coupled with a new right and evidently given for the purposes of its enforcement is exclusive.

To justify the position taken, without expressly overruling its long line of decisions to the contrary, the Minnesota court arbitrarily ingrafted onto the existing system an element that the language of the statute and of the court construing it, as well as elementary principles, plainly exclude. To sustain the new doctrine that there must be a statutory action in the first instance, commenced and prosecuted to a termination, and that other actions may be brought in the home and other jurisdictions, it became necessary to hold that the result in the first action, as to all questions necessarily there litigated, is binding not only on all persons made parties to such action, but all so circumstanced that they might have been made parties could they have been found within the jurisdiction of the court, and on all parties that might have been admitted as participants in the action upon their own application; that in an ancillary action all questions litigated in the principal action must be deemed at rest, so that while defendants in the first action have their day in court as to the vital questions standing at the threshold of their liability, those in actions subsequently brought are bound without having that privilege; that while some stockholders can have their equities as between themselves and as-

sociate stockholders settled in the action where their liability is enforced, others may be made to respond and to cancel their liability, and then be compelled to resort to some other action, in some other jurisdiction, to settle their equities with their associates. It is recognized that it would be unjust to bind a stockholder by an adjudication in an action to which he is not a party; but it is said that such is not the result of the new doctrine, because in the first action the corporation stands for all of its stockholders who are not present. How that can be it is easy to assert, but exceedingly difficult to demonstrate upon principle. The cases cited by the court do not appear to touch the question, as clearly indicated in the able dissenting opinion of Mr. Justice CANTY. We shall not take time to review the authorities which the learned court refers to, to sustain its position on this branch of the case; suffice it to say, that they are all cases to enforce corporate rights. They do not appear to be in point in any respect to the theory they are used to support; not one is a case to enforce a superadded liability of stockholders to creditors or case involving any analogous question.

The corporation is not made a defendant in the principal action as a representative of the stockholders in any sense. It is joined of necessity only where there are corporate assets which ought to be applied to the payment of the debts. Otherwise, it is a proper party, but only for the purpose of establishing against it as a finality the amount of the indebtedness for which the stockholders are liable. The primary right to be adjudicated in such an action is the stockholders' liability. As an incident thereto, where there are corporate assets which should be applied to the payment of the indebtedness, the corporation must be brought in for the purpose of sequestrating and reaching such assets. If there are no such assets the corporation need not be made a party at all. That has been repeatedly held by this and other courts. *Booth v. Dear*, 96 Wis. 516; *Sleeper v. Good-*

win, 67 Wis. 577; *In re People's L. S. Ins. Co.* 56 Minn. 180; *Minneapolis B. Co. v. City Bank*, 66 Minn. 441.

We shall not further discuss the present state of the law governing the subject under consideration as it exists in the state of Minnesota. There are many features, not before referred to, that are entirely out of harmony with the law here and elsewhere under similar statutes. While the statutes of Minnesota, as construed by its court, are supreme in that state, their effect here depends upon the law of comity.

The doctrine of *Hanson v. Davison*, 73 Minn. 454, as we view the decisions cited in support of it by respondents' counsel, and all others bearing on the subject that have come under our notice, from a pretty thorough study thereof, is without substantial support except by *Hale v. Hardon*, 95 Fed. Rep. 747, where two federal district judges rendered a decision following such doctrine and reversing the circuit judge who decided the case in the first instance, and the third member of the court, a circuit judge, dissented from his associates in a vigorous and quite exhaustive opinion, in which he stated, in substance, after reviewing the authorities, that the decision in *Hanson v. Davison* is so out of harmony with the previously established doctrine of the Minnesota court and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality of remedies, and of the right of every person to his day in court as to every material question involving his interest, that there is no rule of comity which requires or justifies its recognition in any other jurisdiction.

With due respect for the able court that pronounced the decision in *Hanson v. Davison*, we have reached the same conclusion as that expressed in the dissenting opinion referred to. To give effect to the Minnesota statutes as now construed by its highest tribunal would be unjust to the defendant, because it would, in effect, make a liability enforce-

able here that was not enforceable when it accrued and that could not have been enforced under the law of Minnesota as it existed prior thereto during the time the defendant was a member of the corporation; it would subject defendant to substantially an independent action to enforce her liability, while, when it accrued, it was enforceable only in an action in equity at the domicile of the corporation, having sole jurisdiction of the entire subject of stockholders' liabilities to the creditors of the corporation, and of all questions necessarily incident thereto; it would conclude her, as to questions vital to her liability, by a judgment rendered in an action to which she was not a party; whereas when she became a member of the corporation she did so in contemplation of a liability with certain incidents, she would be burdened with materially different incidents; whereas the plain purpose of the law is that all stockholders shall stand equally as regards rights and remedies, it would subject the defendant to a much more burdensome remedy, before her ultimate rights could be determined and enforced, than it does the resident stockholders; it would result in giving to resident stockholders their day in court and denying that valuable right to the defendant; it would give effect to a law which is contrary to the policy of the law of this state. For these and many other reasons that might be named, the law of Minnesota, as at present understood, should not be made effective here. Clearly the court cannot, consistent with the rules of comity, give effect to a doctrine which, if recognized, would lead to the oppressive results mentioned.

This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens. Tested by that standard and the most liberal rules usually applied to the subject, courts of this state cannot lend their

aid in the circumstances presented in the complaint before us. A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits. *Gilman v. Ketcham*, 84 Wis. 60; *Emery v. Burbank*, 163 Mass. 326; *Seamans v. Temple Co.* 105 Mich. 400; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39; *Dearing v. McKinnon D. & H. Co.* 33 App. Div. 31.

The doctrine of the *Hanson Case*, 73 Minn. 454, is not sustained, in its main features, in the home court, upon any other theory than that the corporation in the original action stands for all the absent members, and that a judgment as to it, after it has ceased to exist for any practical purpose, concludes such absent members on questions in which the corporation has no interest and as to which it is not bound to protect their interests. That doctrine, as stated in the dissenting opinion referred to, in the federal court, was never promulgated in Minnesota prior to *Hanson v. Davison*, and no case has been found elsewhere, except *Hale v. Hardon*, where it has been even partially recognized, unless based on some special statute entering into the contract sought to be enforced.

The conclusion reached is, that the complaint fails to state a cause of action that can be entertained by the courts of this state, and that the decision of the lower court to the contrary must be reversed and the cause remanded for further proceedings according to law.

By the Court.— So ordered.

DODGE, J. The decision in this case seems to me to destroy a clear and absolute right by denying any remedy for its enforcement, and that, too, for no better reason than mere inconvenience to courts in their procedure; an inconvenience, too, which seems to me rather imaginary than

real. This is a result which is not to the credit of the courts, and should not be reached without a struggle to avert it. The constitution of Minnesota provides, and at the time the defendant acquired his shares of stock did provide: "Each stockholder in any corporation . . . shall be liable to the amount of stock held or owned by him." [Const. art. X, sec. 3.] Under that provision the defendant, with her co-stockholders, were permitted to be a corporation. By availing herself of that privilege she entered into an absolute contract with the creditors of the corporation to pay, if needed after exhausting the assets of the corporation, a sum equal to the par value of her stock. That such is her position, and such the relation to creditors which she assumed, is the settled law of the state of Minnesota. *Willis v. Mabon*, 48 Minn. 140; *Hanson v. Davison*, 73 Minn. 454. Not only is it the law now, but so it was at all the times when defendant acquired or held her stock. I can hardly believe that the suggestion is deliberately made in the opinion of my brethren that the court has changed the law by its decision in *Hanson v. Davison* so that it is now other than it was before. Courts do not make or change law — they declare and administer it — and the supreme court of Minnesota has, by the case last mentioned, simply declared what the law of that state has been ever since the adoption of the constitution. True, that court, or the author of the opinion, in an earlier case had indulged in certain remarks from which might be drawn inferences inconsistent with the decision in *Hanson v. Davison*, but those remarks were mere *obiter dicta*, which, as is usual with *obiter dicta*, did not serve to make or establish any law, but merely to subject to criticism the opinion containing them. This absolute liability existing on the one hand and its corresponding right upon the other, this court is confronted by the command of the constitution of Wisconsin (art. I, sec. 9): "Every person is entitled to a certain remedy in the laws for all in-

juries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." That command is disobeyed, and the excuse does not seem to me sufficient. That excuse is that this court, like the court of Minnesota, long ago decided that serious inconvenience and confusion would result from enforcement of the individual liability of each stockholder at the behest of each creditor and therefore that, for mere convenience of procedure, the action which the courts were bound to extend to a creditor having such a right should be an equitable one, in which, as plaintiffs, should be joined all the creditors, either actually or by representation, and to which should be joined such of the stockholders as could be brought within the jurisdiction of the court, together with the corporation itself, to the end that in the one action the court might ascertain the extent to which the assets of the corporation were inadequate to satisfy its debts and the resulting extent of the liability of stockholders, and could adjust and apportion that liability among such of them as were solvent. That is the whole scope and extent of the decisions in this state from *Coleman v. White*, 14 Wis. 700, to *Foster v. Posson*, 105 Wis. 99. That, too, is the full extent of the decisions of the supreme court of Minnesota. Now, for the first time it is held that the judgment in such a suit discharges the liability of all stockholders, whether parties to it or not, and that the stockholder who evades the jurisdiction, either as a fugitive or as a nonresident, until the judgment has been rendered, has successfully defied and annulled the constitution of Minnesota and of this state as well.

The cases referred to could not, with propriety, go further than decision of the questions presented in them. Courts are created to decide controversies, not to emit abstract

treatises. It is, therefore, as always, to be presumed that any utterances general in their terms were not intended by the court to apply to controversies or situations distinguishable from those present for decision. The assertion in *Coleman v. White* that a general equitable suit, with all creditors as plaintiffs, and all stockholders within the jurisdiction, together with the corporation, as defendants, is the exclusive remedy, could mean no more than that such remedy is exclusive of a direct action at law by one creditor against one stockholder when the equitable procedure was neither obstructed nor exhausted. So the assertion in *Foster v. Posson* that the judgment in such general suit is final as to all rights, whether as between creditors and stockholders or as between different stockholders, must be understood as limited to stockholders over whom the court had jurisdiction, since that was the situation of those litigating as alleged by the complaint, though the fact is not made apparent in the opinion.

The suggested inconveniences attending the enforcement of the creditors' rights against stockholders who successfully evade the jurisdiction in the original suit are quite fully demonstrated to be insignificant by the reasoning in *Hanson v. Davison*, 73 Minn. 454, and in *Hale v. Hardon*, 95 Fed. Rep. 747, which I shall forbear repeating. In the case presented by the complaint at bar there are absolutely none. The excess of debts over all assets in an amount exceeding the total stock, and the entire exhaustion of all stockholders over whom jurisdiction can be obtained, are set forth; and the absolute liability of defendant for a definite amount, with no possible right of contribution against any solvent co-stockholders, is made to fully appear. Is it not the part of justice to vindicate the clear rights of the plaintiffs in this case, where it is obvious that no undue or unequal injury will be done the defendant, rather than to perpetrate certain wrong on the plaintiffs from mere apprehension that

under some other circumstances it might not be easy to fully protect a defendant? If either is to suffer, should it not rather be the stockholder, who, by the same diligence she finds easy when demanding her dividends, could have informed herself of the general litigation and, by appearing therein, have protected herself from any inequality? I the more deplore this decision because it diminishes the solvency of our own banks, and denies to their creditors the liability of any stockholders who, by reason of nonresidence or otherwise, may escape the process of the court in which the general equity suit must be prosecuted. It invites fraud and evasion by offering exemption to stockholders upon the easy expedient of placing their holdings in the names of nonresidents. These are evils which, with the probable drastic legislation to avert them, seem to me much more terrible than the inconvenience of courts or incongruity in mere forms of procedure.

Since the decision of this case, the opinion of the supreme court of the United States in *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, has been published, and seems to me to be squarely in conflict with the opinion of this court. True, the liability under the Kansas constitution was there under consideration, but the recovery was justified not alone because the statute of Kansas would permit it, but because the provision of the constitution was self-executing and, without the aid of any statute, imposed a contract liability upon holders of stock enforceable in any court of general jurisdiction, considerations equally characterizing the Minnesota constitution. In that case also is shown how untenable are the objections to the binding effect upon stockholders of the adjudication against the corporation in the general closing-up action, which objections are deemed so weighty by my brethren.

JOHNSON, Appellant, vs. HUBER, Respondent.

March 1—March 20, 1900.

106 282
107 34
106 282
109 165

Equity: Enforcing judgment after settlement: Injunction: Remedy at law: Waiver.

106 282
s117 58

1. An attempt to enforce a judgment in violation of an agreement for the settlement thereof which has been consummated by the judgment debtor by making payments as agreed, is inequitable and fraudulent, and a court of equity will restrain such enforcement and require the removal of the cloud caused by such judgment on the title to land.
2. In an equitable action the objection that there is an adequate remedy at law is waived by service of an answer in which such objection is not raised.

APPEAL from a judgment of the circuit court for Pierce county: A. J. VINJE, Judge. *Reversed.*

Judgment dismissing the complaint on sustaining a demurrer *ore tenus*, after receiving the evidence offered on both sides. From the complaint it appears that the defendant *Huber* had recovered a judgment in an action of slander against the plaintiff for about $600 damages and costs; that, after plaintiff here had made some effort toward appeal, and before time for appeal had expired, the parties, together with a brother-in-law of both, met and negotiated for a settlement, and an agreement was reached to accept and pay $300 in full, this plaintiff also to forego any right of action for alleged slander addressed to him by *Huber;* that such agreement for settlement was consummated by the present payment of $50 from *Johnson* to *Huber*, and an agreement to pay the remaining $250 to a designated banker within ten days, which was done by plaintiff; that the defendant *Huber* thereafter repudiated said settlement, refused to receive said $250 from the depositary, and proceeded by execution to collect said judgment, which execution, at the time of commencement of the suit, was in the hands of the sher-

iff and had been levied upon certain real estate of the plaintiff. The plaintiff also alleges ownership and possession by the plaintiff of certain real estate in Pierce county, whereon said judgment is an apparent lien and clouds the plaintiff's title. The prayer is for the cancellation of said judgment of record, restraint of the sheriff from enforcing his execution, and intermediate restraint of the defendant *Huber*, his attorneys, agents, and all persons acting for him, from taking any steps upon said execution or to enforce the judgment, and for such other or further judgment as the court should deem meet. Before the commencement of the trial, the sheriff having returned the execution unsatisfied, the suit was, by stipulation, dismissed as to him.

The answer did not raise, as objection to the taking of jurisdiction of this action, that plaintiff had any other remedy. To the order sustaining the demurrer *ore tenus* plaintiff duly excepted, and from the judgment based thereon he brings this appeal.

For the appellant there was a brief by *Baker & Haven*, and oral argument by *Spencer Haven*.

For the respondent there was a brief by *E. W. Bundy* and *A. Combacker*, and oral argument by *Mr. Bundy*.

DODGE, J. The objections raised to the complaint were absence of jurisdiction of the subject matter and the existence of an adequate remedy at law. They are supported in this court, and presumably were in the court below, by the contention that plaintiff might have obtained all the remedy sought in this action by a motion in the suit of *Huber v. Johnson*, where the court would have had power to grant such relief either by virtue of sec. 2911, Stats. 1898, or by virtue of the control inherent in courts over the enforcement of their own judgments. That contention might well be conceded without affecting the conclusion in this case. The jurisdiction of courts of equity by proceedings *in personam*

to prevent the inequitable or fraudulent use of judgments is perfectly well established. It was last declared by this court in the two very recent cases of *Crowns v. Forest L. Co.* 102 Wis. 97, and *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125. True, the court was there speaking of judgments obtained inequitably, but the jurisdiction is equally applicable to judgments of which the enforcement has become inequitable or fraudulent by reason of events subsequent to their rendition. *Felch v Lee*, 15 Wis. 265; *Hooper v. Smith*, 74 Wis. 530; *Marsh v. Haywood*, 6 Humph. 210. We might add that an element of the relief sought and supported by allegations of the complaint is the removal of a cloud caused by the unsatisfied judgment upon the title of the plaintiff to certain real estate. This also is a frequently exercised jurisdiction of courts of equity.

The objection that adequate relief can be otherwise obtained, now urged to the exercise of such power, is waived if not raised by demurrer or answer. Some little uncertainty cast upon the universality of this rule has certainly now been removed by the recent case of *Hoff v. Olson*, 101 Wis. 118, reference to which renders citation of other authorities unnecessary. The service of the answer in this case, making no objection by reason of the existence of any other remedy, has completely waived it and submitted the rights of both plaintiff and defendant to consideration and adjudication according to equitable methods, and the objection to admission of all evidence by reason of the existence of such other remedy should have been overruled, instead of sustained, and the judgment entered as upon the sustaining of a demurrer must be reversed.

Such judgment being reversed, we are confronted by a record in which it appears that, before deciding upon its admissibility, all evidence offered by either party was received, and the case ready for decision upon its merits. The court should have proceeded to make findings of fact upon

such evidence, and conclusions of law therefrom, and to render judgment. If the case presented by the evidence were doubtful, we might deem it best to remand the cause with direction to the court below to make such findings; but we have carefully examined the evidence and are satisfied that the preponderance is overwhelming in support of the cause of action set forth in the complaint. The making of an agreement to accept $300 in full satisfaction in consideration of the surrender by the plaintiff, *Johnson*, of his right to appeal, and of his claim, if any he had, against the defendant for slander, is established by the testimony of both plaintiff, defendant, and a brother-in-law of both of them, who was present. The payment of the $300 in compliance with that settlement — $50 to the defendant *Huber* and $250 to his agent designated to receive the same — is without dispute; and the suggestion of the answer that such agreement or settlement was not understood by the defendant, and was brought about by duress, is wholly unsupported. The fact is admitted that the plaintiff is the owner of real estate, upon the title to which a cloud is created by the pendency of this judgment unsatisfied of record. From these facts we cannot avoid the conclusion that either any attempt to enforce this judgment against the plaintiff, or even the maintenance of it of record ostensibly unsatisfied, is an inequitable — nay, fraudulent — use of it, which the court should prevent by proper decree; and we decide, therefore, to remand this case with directions to enter a decree to accomplish that result, namely, perpetually enjoining the defendant from taking any steps to enforce that judgment as against the plaintiff or his property, and commanding the defendant that he forthwith cancel and satisfy said judgment upon the records of the court.

By the Court.— Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

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106 286
112 478

THE PARRY MANUFACTURING COMPANY, Plaintiff in error, vs. TOBIN, Defendant in error.

March 1—March 20, 1900.

Sale of chattels: Breach of warranty: Election between remedies: Recoupment: Instructions to jury: Evidence: Measure of damages.

1. The vendor of vehicles warranted "wheel, spring, and axle," and agreed to replace or repair them if defective on account of material or workmanship, and also warranted the paint not to peel or flake. There was no stipulation that the vendee should return or offer to return defective parts, nor for the trial of the vehicles within a limited time, nor for notice of defects, nor for an opportunity to replace or repair, nor for rescission, nor for waiver by conduct. *Held*, that in case of a breach of the warranty by reason of latent defects the vendee might, without notifying the vendor thereof, retain the defective vehicle and, if sued for the price, recoup his damages for such breach.
2. The warranty of wheel, spring, and axle covered only "private vehicles" and was for one year only, but the warranty of the paint was not so limited. *Held* that, recoupment being sought in an action for the purchase price, the court properly refused to instruct the jury that they must not consider any evidence of defects observed over a year from the date of shipment, and that they must exclude all damages on account of defects in vehicles which the vendee had sold to liverymen for public use.
3. In such action the admission of testimony on behalf of defendant as to defects not covered by the warranty was a material error, and was not cured by an instruction that damages could be allowed only for the defects warranted against.
4. The proper measure of damages for breach of warranties of vehicles sold is the difference between their actual value at the place of delivery and the value they would have possessed there had they been as warranted.

ERROR to review a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

James A. Frear, for the plaintiff in error.

For the defendant in error the cause was submitted on the brief of *Smith & Oakes.*

CASSODAY, C. J. This action was commenced in a justice's court to recover $82 and interest as the balance due to the plaintiff company from the defendant, *Tobin*, for forty-four vehicles ordered by him from the company in 1897, and shipped by the company from Indianapolis to the defendant at New Richmond. The company recovered judgment before the justice, and *Tobin* appealed to the circuit court. Thereupon *Tobin* amended his answer by way of denials, admissions, and counter allegations, claiming damages by way of recoupment and counterclaim for breach of the printed warranty contained in the company's catalogue and incorporated into the order, and which reads as follows:

"*Guaranty on Four Wheelers as Private Vehicles Only.*

"With fair and reasonable usage, wheel, spring, and axle are warranted for one year. If defective on account of material or workmanship, we will replace or repair the same free of charge, on return of defective part to us. Should we find, on examination, that the parts so returned were not defective in material or workmanship, we will charge for repairing the same, including all expenses to us, attached to the return of the broken parts. We will not allow deductions for any cash you may pay out.

"Damage to paint or varnish on account of ammonia or exposure to the elements, loose and worn-out tires, or a broken spring that does not show a flaw in the steel, cannot be considered as coming under this guaranty. The above guaranty on wheels does not apply unless tire is kept tight, and wheel properly dished.

"Remember that by shipping goods under a general release clause we obtain freight rates very much lower than otherwise, for the sole benefit of our customers. Bear this in mind, and do not hold us responsible for loss or damage caused by transportation companies.

"We deliver the work in good condition to the transporta-

tion companies, taking their receipts for the same. Our responsibility thereafter ceases. You must make your claims for damage against the transportation company. Wheels, axles, and springs,—if they prove defective on account of poor work or material,— we will give you two to replace the one broken."

Defendant counterclaimed also for the breach of the warranty written in the order as follows: "Paint guaranteed not to peel or flake."

The company replied, and put in issue the allegations of the counterclaim. At the close of the trial the jury returned a verdict, wherein they found for the defendant, *Tobin*, and assessed his damages at $11.90. To reverse the judgment entered thereon for that amount of damages and $65.47 costs and disbursements, the company sued out this writ of error.

As indicated in the statement, the order contained a written guaranty that the "paint" would not "peel or flake," and the only other warranty was contained in the catalogue, and that only extended to "wheels, springs, and axles" of "private vehicles," and as to them only "for one year," with certain limitations as to the extent of such warranties. Counsel for the company contends that the defendant was not entitled to recover damages for the breach of any of such warranties, without first returning or offering to return the defective parts for replacement or repair,— which was never done. Accordingly, error is assigned because the court refused to instruct the jury to the effect that, before the defendant could recover for any such breach, he was obliged to notify the plaintiff of any failure of warranty or defects of workmanship or material; that, unless the plaintiff had knowledge of such defects and refused to repair or remedy the same, the plaintiff was entitled to recover the full amount of the purchase price. In support of such contention counsel cite and rely upon *Kingman & Co. v. Watson*,

97 Wis. 596, and *Nichols & Shepard Co. v. Chase*, 103 Wis. 570. These cases are clearly distinguishable. The contract in the last of these cases was in no respect like the one in the case at bar. Nor does the contract in the case at bar bring the case within the ruling of the first of the cases cited. True, the plaintiff in this case agreed to replace or repair parts defective on account of material or workmanship, but there is no stipulation that the defendant should return or offer to return such parts, nor for the trial of the vehicles within a limited time, nor for notice in case of defects or failure to fulfill the warranty, nor for an opportunity to replace or repair, nor for rescission in case of failure, nor for waiver by conduct. Such being the nature of the contract, it is well settled by numerous decisions of this court that, in case there was a breach of the warranty by reason of latent defects in any of the vehicles, the defendant had two remedies. One was to return the defective vehicle or part thereof, and recover back any sum paid thereon, with interest. *Fisk v. Tank*, 12 Wis. 277, 303, 304; *Woodle v. Whitney*, 23 Wis. 55; *Boothby v. Scales*, 27 Wis. 636; *Merrill v. Nightingale*, 39 Wis. 247; *Churchill v. Price*, 44 Wis. 540; *Warder v. Fisher*, 48 Wis. 338. The other remedy is to retain the article and, if sued for the price, allege and prove the breach, and have damages therefor allowed by way of recoupment or counterclaim. *Fisk v. Tank, supra; Bonnell v. Jacobs*, 36 Wis. 59; *Merrill v. Nightingale*, 39 Wis. 247; *Warder v. Fisher, supra; Red Wing Mfg. Co. v. Moe*, 62 Wis. 240; *Buffalo B. W. Co. v Phillips*, 67 Wis. 129; *Larson v. Aultman & Taylor Co.* 86 Wis. 281. And this is so even where the vendee fails to notify the vendor of the defect. *Id.* It follows that there was no error in admitting evidence as to any of such breaches of warranty.

As indicated, the warranty on "wheel, spring, and axle" only continued for one year, and it would have been error had the court refused to so instruct the jury; but the instruc-

tion refused covered all defects "observed" over a year from date of shipment. That was inaccurate, since there was no year limit on the warranty that the paint would not "peel or flake." The court was requested to instruct the jury that they must exclude all damages to such vehicles as were sold to liverymen for public use. That was inaccurate, since the guaranty on "wheel, spring, and axle" of "four wheelers," only was confined to "private vehicles." Nevertheless, the court should have separated such "private vehicles" from those sold for public use, and it was error not to observe such distinction in the admission and exclusion of evidence. It is true that the court charged the jury, "as a matter of law," that they "must consider that the buggies sold upon this contract fulfilled the warranty upon everything except the paint," and that they could only allow damages to the defendant "caused by the flaking and peeling of the paint." Such direction to the jury was only prejudicial to the defendant, and, had all the evidence admitted, and to which the plaintiff objected and took exception, been relevant and material to the questions of such breaches of warranty, the plaintiff would have had no ground for complaint. But, as already indicated, it was not so limited. On the contrary, there was considerable irrelevant testimony, admitted against the objection of the plaintiff, as to the corners of the boxes being opened, the boxes being broken, the seats being loose, the boxes being spread, the cross-bars getting loose and defective, the screws coming out, and other defects unnecessary to here mention. We are forced to the conclusion that there was a mistrial.

We think the proper measure of damages for the breach of the warranty, if any, was the difference between the actual value of the defective vehicles at New Richmond and the value they would have possessed at that place if they had been as warranted. *Merrill v. Nightingale*, 39 Wis. 247; *Aultman & Taylor Co. v. Hetherington*, 42 Wis. 622;

J. I. Case Plow Works v. Niles & Scott Co. 90 Wis. 590. We perceive no error in the rulings of the court on the subject of damages.

There may be other errors in the record, not mentioned, but they are not likely to be repeated.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WELSHER, Respondent, vs. LIBBY, MCNEIL & LIBBY, Appellant.

March 1—March 20, 1900.

Appealable orders.

1. An order refusing to set aside the service of the summons and complaint on a foreign corporation is not appealable.
2. An order cannot be treated as a judgment for the purposes of appeal merely because it imposes costs of motion.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Appeal dismissed.*

For the appellant there was a brief by *Buell & Hanks*, and oral argument by *S. C. Hanks.*

For the respondent there was a brief by *Shuttleworth & Dibble*, and oral argument by *F. K. Shuttleworth.*

WINSLOW, J. This is an appeal by the defendant, a foreign corporation, from an order of the circuit court refusing to set aside the service of the summons and complaint, and imposing costs of motion. The appeal must be dismissed, because the order is not an order within the category of appealable orders contained in sec. 3069, Stats. 1898, nor is there any special statute making such order appealable. The idea seems to have been entertained that, because the order

imposed costs of motion, it should be treated as a judgment for the purposes of an appeal, such idea being founded upon inaccurate language used in *Kingsley v. G. N. R. Co.* 91 Wis. 380. This idea was distinctly rejected in *Lewis v. C. & N. W. R. Co.* 97 Wis. 368, and it is not necessary to further enlarge upon the subject.

By the Court.—Appeal dismissed.

MARKING and others, Respondents, vs. MARKING, imp., Appellant.

March 2 — March 20, 1900.

Deeds: Adequacy of consideration: Undue influence: Confidential relations.

1. A woman eighty-eight years old conveyed land worth $1,400 to her son in consideration of his agreement to pay her $50 per year during her life and to pay the incumbrances on the land, being the sum of $200 due to the state on the original purchase price, and a mortgage for $700. These sums were past due and were bearing interest, and the grantor was unable to pay them. Had payment been enforced it is doubtful if the property would more than have paid principal, interest, and costs. *Held*, that the transaction was not so unjust or unreasonable, as a business proposition, as to indicate on its face that the son had taken advantage of his mother to secure an unjust benefit to himself.
2. The mother in such case had a good memory and understood what she was doing, and the son did not attempt to deceive her, but she followed his suggestions because she relied on his judgment. *Held*, that the deed would not be set aside on the ground of undue influence at the suit of the heirs of the grantor. In order to warrant such relief one party must have gained an unconscionable advantage over the other by improper means and practices.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellant there were briefs by *Jones & Stevens*, and oral argument by *E. Ray Stevens*.

For the respondents there was a brief by *H. Pfund* and *F. W. Hall*, and oral argument by *Mr. Hall*.

BARDEEN, J. This is an action in equity to set aside a deed from Magdalena Marking, deceased, to her son, the defendant *John Marking*, on the ground of undue influence. The court found that Adolph Marking purchased the land in 1852, and died in 1868, and the property passed to his widow. In 1890 she deeded the same to her son, who gave her a contract to pay her $50 per year during life. At that time the property was worth $1,400. Her son held a mortgage upon it amounting to over $700. There was also at that time due the state of Wisconsin $200, as near as we can make out, on the original purchase price of the land. The consideration for the deed was the contract mentioned, the release of the mortgage, and the payment by the son of the amount due the state. The son continued to occupy the premises until September 28, 1891, when he conveyed the same to the defendant John Wagner, who the court finds was an innocent purchaser. The mother lived until July 9, 1897, and at different times from 1890 to 1897 the son paid to *Mrs. Eiler* $325 for the mother, upon the contract mentioned. This was the full amount due on the contract according to its terms, except that for one year there was a rebate of $25 allowed by agreement.

The court finds that at the time this deed was made the grantor was eighty-eight years of age; that she was somewhat frail in mind and body, and partially blind; that at times she labored under hallucinations as to her ability to communicate with the future world, which would last two or three days, after which she was rational and competent to understand her affairs to such an extent as was usual with persons of her age and health. The court finds fur-

ther that her son took her to a notary, who drew the deed; that the mother understood what was being done, but did not act upon her own will; that she relied upon and followed her son's suggestions "simply by reason of the fact that she believed in his judgment;" that there was no actual deception or overpersuasion, but, because their relations were confidential, the mother did not exercise an independent judgment, and hence acted under undue influence.

The conclusion of the court was that the deed was void and that the heirs of Mrs. Marking were entitled to maintain this action. Wagner being an innocent purchaser, the court found the value of the land as stated, and, after deducting the amount due the state and upon the mortgage, gave judgment for $495.08, which was to be distributed among the heirs on the basis that each child of Mrs. Marking, excluding defendant *John Marking*, was entitled to one sixth. The evidence showed that there were seven children, and the judgment rendered excludes said defendant from any interest in his mother's estate. The conclusion we have arrived at, however, renders this circumstance of no importance.

The defendant, who has appealed from the judgment, insists that, if it be admitted that all the facts stated in the findings are true, the situation presented is not such as to warrant the court in the conclusion reached. With this contention we are inclined to agree. The proofs fall far short of showing a case where the defendant has profited by the exercise of undue influence upon his mother. In the first place, the court was in error in assuming that the mother's interest in the property at the time the deed was made was the difference in dollars and cents between the value of the land and the other amounts stated. She had but an equity of redemption, liable to be defeated by an assertion of the claim of the state, and further incumbered by a mortgage of over $700. These sums were past due, and were bearing

interest. She had no funds to pay them, and they could be enforced at any time. Had they been enforced, it is doubtful if the property would more than have paid principal, interest, and costs. It is also doubtful if the mother could have secured a more advantageous sale than she did had she been dealing with a stranger. As a business proposition, it was very far from being unjust or unreasonable. So we say there was certainly nothing on the face of the transaction that would indicate that the son had taken advantage of his mother to secure an unjust benefit to himself. It was certainly not an improvident act of Mrs. Marking to convey the land to her son under the circumstances suggested. Considering the value of the property, the indebtedness against it, and the contract made and kept, the consideration was ample. The conveyance was eminently reasonable and just.

Moreover, the court has not found facts that would justify the interference of a court of equity. On the subject of undue influence in securing the deed, the court finds that the son did not attempt to deceive his mother, but that she followed his suggestions because she relied upon his judgment. There was no fear or coercion, no importunity, or even an appeal to the affections. The ground upon which courts of equity grant relief in such cases is that one party, by improper means and practice, has gained an unconscionable advantage over another. "It must amount to force or coercion destroying free agency." *Conley v. Nailor*, 118 U. S. 127; *Dunlap v. Robinson*, 28 Ala. 100; *Mooney v. Olsen*, 22 Kan. 69. Here both elements are lacking. There were no improper means or practices used, and no showing of an unconscionable advantage. Admit that the mother was old, infirm, and weak-minded. As said in *Dailey v. Kastell*, 56 Wis. 444, on page 453: "It is not unlawful to influence a weak-minded person to do that which is just and for the best good of such person. Such influence is not undue,—in other words, is not fraudulent,—and does not necessarily

vitiate the act produced by it." The mother had a good memory, understood what was being done, and was not deceived. But we need not prolong the discussion.

The plaintiffs' case fails upon both the grounds suggested.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

DODGE, Respondent, vs. O'DELL'S ESTATE, Appellant.

106 296
109 601

March 2 — March 20, 1900.

Support of person since deceased: Joint ownership of claim: Court and jury: Special verdict: Appeal: Record: Contents of excluded documents: Evidence: Immaterial error.

1. In an action to recover for the support of a person since deceased the evidence of the mutual participation by the plaintiff and his mother in maintaining the household wherein the deceased was supported is *held* sufficient to take to the jury the question whether they jointly participated in furnishing the support.
2. The form of a question in a special verdict is very largely in the discretion of the court; and if that adopted fairly calls for the conclusion of the jury upon the material issue of fact, the discretion of the court should not be disturbed.
3. The unities of interest, time, title, and possession in the ownership of an indebtedness for support result by operation of law from a joint participation in furnishing the support during the period covered by the claim. A question of a special verdict whether the parties participated jointly in furnishing the support was therefore sufficient to cover the question of joint ownership of the claim.
4. A refusal to receive documents in evidence cannot be held error if the record on appeal contains no authentic information as to their contents.
5. In an action against an estate to recover for support furnished the deceased in her lifetime, the estate is *held* not to have been prejudiced by the admission of evidence tending generally to show that the deceased had had trouble with her relatives just prior to the time when the support commenced.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

From 1887 to about 1891 the plaintiff, being the owner of a considerable farm inherited from his father, occupied the same with his mother, who had right to an unassigned homestead and dower therein. They, together with a sister of plaintiff, lived together as one family, he conducting the farm and the mother managing the household, all expenses being paid indiscriminately out of a common fund kept in the house, accessible to both, and supplied by the sale of the proceeds of the farming. In 1887 Rachel O'Dell, the deceased, an elderly and homeless woman, came to their house, and was cared for and boarded until her death in 1893. A guardian was appointed for her in 1890, who paid her board subsequent to that time. After his mother's death the plaintiff, as survivor, presented a joint claim of himself and his mother for support of the deceased, Rachel, against her estate. Upon the trial the principal controversy, which is brought before us for review, was whether the plaintiff and his mother jointly furnished the support, it being contended by defendant that it was the mother's household, and the indebtedness if any was to her. The court submitted to the jury a special verdict, of which question No. 3 alone related to that controversy, and inquired: "Did Harriet S. Dodge and *John W. Dodge* participate jointly in furnishing support to said Rachel O'Dell, deceased?" Answered, "Yes." No instructions were given to guide the jury in answering this question, and counsel for the estate requested none, but did request the submission of a question in the special verdict, as follows: "Was there a unity of interest, of title, of time, and of possession, on the part of *John W. Dodge* and Harriet S. Dodge, in the matter of the lodging, care, and support of Rachel O'Dell, and in the prospective emoluments from such lodging, care, and support?"— the submission of which ques-

tion was refused. On the trial the defendant made an offer in evidence *in solido* of all the papers, records, and proceedings in the county court relating to the estate of Rachel O'Dell, deceased, for the purpose of showing the record and proceedings under the Conrad Failinger administration proceedings. It was objected to as immaterial, irrelevant, and incompetent, and was excluded. Those papers have not been embodied in the bill of exceptions. It is asserted that they would disclose that a petition for administration was made by Harriet S. Dodge as a creditor in 1893; that an order for appointment of the plaintiff, *John W. Dodge*, as administrator, was made, but he failed to give any bond; that in 1896, upon a petition by him, one Failinger was appointed administrator, qualified as such, and in due form took out and published an order to limit the time for presentation of claims, and that plaintiff's claim was not presented during the time so limited; and that thereafter the county court had by order entirely set aside said Failinger administration, revived the appointment of the plaintiff as administrator, and, he having qualified, fixed a new period for presentation of claims, whereupon this claim was presented.

Judgment was rendered in the circuit court, from which this appeal is taken.

A. G. Zimmerman and *J. C. Harper*, for the appellant.

For the respondent there was a brief by *F. J. & C. F. Lamb*, and oral argument by *F. J. Lamb* and *C. F. Lamb*.

DODGE, J. Substantially but three assignments of error are presented:

1. That the finding in the special verdict that the plaintiff jointly participated with his mother, Harriet S. Dodge, in furnishing the support upon which liability of the estate is predicated, is wholly unsupported by the evidence. We cannot agree with this contention. The evidence of the

mutual participation by the plaintiff and his mother in maintaining the household wherein the deceased was supported was sufficient to carry the question to the jury.

2. It is contended that, instead of the question submitted by the court, there should have been put that requested by the appellant, as quoted at length in the statement of facts. We are persuaded that the question submitted was much more intelligible, and more likely to secure the conclusion of the jury upon the material fact, than that framed by the appellant, which is involved and would be well-nigh unintelligible to the average layman. The form of questions, as has been many times said, is very largely in the discretion of the court; and, if that adopted fairly calls for the conclusion of the jury upon the material issue of fact, the discretion of the court should not be disturbed. *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 285; *Raymond v. Keseberg*, 98 Wis. 317, 320. It may further be suggested that most of the elements of the question requested are legal conclusions. If in fact plaintiff and his mother jointly participated in furnishing the support during the period covered by the claim, all these unities in the ownership of the indebtedness for such support result by operation of law. That indebtedness arises by implication of a contract to pay. If the service was joint, the contract will be implied to pay them jointly, and unity of title, of possession, and of interest in that single indebtedness cannot fail to exist. The time of the service of each was the same, and their rights in the indebtedness therefore commenced at the same time. The third question fairly left to the jury the only controverted question of fact, and from their conclusion thereon, and from the undisputed facts, must necessarily result all the necessary "unities."

Some criticism is made by appellant of the phraseology of certain other questions in the special verdict, but, no excep-

tions thereto having been taken at the trial, we cannot consider them.

3. The appellant assigns as error the refusal to admit in evidence certain records of the county court in the O'Dell estate, claiming that such records would have shown this claim to be barred for the reason that it was not presented within the time limited by a certain order for the presentation of claims under the Failinger administration, which respondent claims was wholly without jurisdiction. The appellant made the tender of all the papers *en masse*, "for the purpose of showing the proceedings under the Failinger administration," but has failed to bring up in the bill of exceptions either the contents in full of those papers or any information with reference thereto, so that we cannot tell whether they were of the character claimed for them. Even if we assume that jurisdiction existed to do so, we cannot know that any order limiting time to hear claims was made or published, or that any act was done which would have barred this claim, nor that any of the papers contained any matter relevant to such considerations, so that they should have been received. Error must be made to affirmatively appear, and, without some authentic information as to the contents of the papers so offered, we cannot hold that any error was committed in excluding them. *Slauson v. Goodrich Transp. Co.* 99 Wis. 20.

We cannot discover any prejudice to the appellant from the admission of two or three items of evidence tending generally to the effect that Mrs. O'Dell had trouble with relatives with whom she had resided just prior to the commencement of her residence with the plaintiff and his mother. The testimony seems not to have been relevant or material, but we are forbidden to reverse for errors by which the appellant has not been prejudiced. Sec. 2829, Stats. 1898.

A supplemental case printed by respondent is made up

of matter in no wise essential to the consideration of any of the errors assigned. It was unnecessary, and the expense of printing it should not be allowed him in taxing costs.

By the Court.—Judgment affirmed.

VASSAU, Respondent, vs. THE MADISON ELECTRIC RAILWAY COMPANY, Appellant.

March 2 — March 20, 1900.

Street railways: Ejection of passenger: Punitory damages: Ratification of wrongful acts: Instructions to jury: Injury to feelings.

1. Plaintiff, accompanied by a young lady, tendered a genuine half dollar in payment of street-car fares, which was accepted and the proper change returned. Subsequently the conductor, from the peculiar appearance of the coin, came to the conclusion that it was counterfeit, and tendered it back to the plaintiff and told him to get off or pay again. Plaintiff testified that upon his refusal to do so the conductor took hold of him by the collar and pulled, and that he then got up and walked out peaceably, the young lady accompanying him; and that the conductor spoke harshly and loudly, attracting the attention of the other passengers. Plaintiff had other money in his pocket. In an action to recover for such ejection, the evidence (more fully stated in the opinion) is *held* insufficient to warrant a finding by the jury that the plaintiff was ejected "under circumstances of aggravation, insult, or cruelty," or "with vindictiveness or malice." An instruction authorizing them to award punitory damages was therefore error.
2. Evidence in such case — to the effect that when plaintiff reported the matter to defendant's superintendent the latter told him that the conductor was one of the oldest on the line, and the company would stand by what he did; that he had the power to protect the company's property — a right to put plaintiff off; and that the matter should be looked up to ascertain whether the coin was counterfeit — is *held* insufficient to show that the superintendent authorized or ratified any aggravating, insulting, cruel, vindictive, or malicious conduct on the part of the conductor.

3. It was error, in such case, to refuse to instruct the jury that "in considering the question whether there was any injury to the feelings of plaintiff, you have the right to consider his conduct and that of the conductor, and, among other things, whether or not the plaintiff sought to avoid trouble, or whether his conduct was such as tended to provoke and cause trouble unnecessarily."

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*. They argued, among other things, that exemplary damages should not be awarded in cases of this character. *Gillen v. M., St. P. & S. S. M. R. Co.* 91 Wis. 633; *Phettiplace v. N. P. R. Co.* 84 Wis. 412; *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 40; *Van Dusan v. G T. R. Co.* 97 Mich. 439; *Hamilton v. Third Ave. R. Co.* 53 N. Y 25, 29; *Pine v. St. Paul City R. Co.* 50 Minn. 144; *Fitzgerald v. C., R. I. & P. R. Co.* 50 Iowa, 79; *Rose v. Wilmington & W. R. Co.* 106 N. C. 170; *Gibson v. E. T., V. & G. R. Co.* 30 Fed. Rep. 904; *Paine v. C., R. I. & P. R. Co.* 45 Iowa, 569; Booth, Street Railway Law, 558. By his unwillingness to take back the money or to make any explanation as to the ancient coin, and by daring the conductor to touch him, the plaintiff showed a willingness to annoy the conductor and perhaps set a trap, which the jury had a right to take into consideration in determining how deeply he was wounded or disgraced, and in determining whether the company should be punished by exemplary damages. His refusal to tender another coin when he had it in his hand was also significant. *Van Dusan v. G. T. R. Co.* 97 Mich. 439; *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126; *Gibson v. E. T., V. & G. R. Co.* 30 Fed. Rep. 904, 905; *Scott v. C. P., N. & E. R. R. Co.* 53 Hun, 414; *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 40; *Yorton v. M., L. S. & W. R. Co.* 54 Wis. 234, 241; *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18.

For the respondent there was a brief by *Richmond & Smith*, and oral argument by *J. B. Smith*.

CASSODAY, C. J. This action is brought to recover damages for being wrongfully ejected from the defendant's street car while riding thereon January 8, 1898, as a passenger for hire. The defendant answered by way of admissions, denials, and counter allegations to the effect that the conductor in charge of the car at the time received from the plaintiff, in payment of his fare and the fare of a lady with him at the time, a half dollar, and gave him back forty cents in change; that on examining the half dollar he in good faith believed, from its unusual and suspicious appearance, that it was not genuine but counterfeit, and so informed the plaintiff and requested him to take it back and pay him in other money; that after the plaintiff had persistently refused for several blocks he, in the discharge of his duties, in a gentlemanly and courteous manner, took hold of the plaintiff and put him off the car.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $500. Thereupon the defendant moved the court to set aside the verdict, and grant a new trial, on several grounds stated, and, among others, for the reason that the damages were excessive. The court thereupon granted the motion upon that ground, with leave to the plaintiff to remit from the verdict $250, and, the plaintiff having filed notice of such remission, the court ordered the verdict to stand at $250, and that judgment be entered thereon in favor of the plaintiff for that amount. From the judgment so entered, with costs and disbursements, the defendant brings this appeal.

On the trial the plaintiff testified to the effect that they had gone six or seven blocks after he had paid his fare, when the conductor came to him and said that he had given him a counterfeit half dollar; that he insisted that he had not; that the conductor had the coin in his hand, and was showing it to him; that the conductor wanted him to take the coin back and give him back the forty cents in change,

which he refused to do, and told the conductor that if the coin was counterfeit he did not want to have it on him; that the conductor told him he had to get off or pay again, that he had ridden so far for nothing; and that he told the conductor that he would not pay again and that he would not get off until he got to his destination; that there were about twenty passengers in the car; that the conductor spoke very harsh and loud, so that it turned the attention of all the people in the car toward him and the young lady with him; that the conductor told him to get off, a second or third time; that when he refused to get off the conductor said he would put him off, and that he said, "All right, if you are big enough man to put me off, go right ahead; otherwise I will not get off," and so the conductor took hold of him by the collar, and pulled him, and said, "Come along, you have got to leave the car;" that he then got up and walked out peaceably, and the young lady went with him; that the conductor talked loud enough so that people could hear while the car was in motion; that he resisted the conductor when he attempted to take him off by holding back on the seat a little, but that he did not make him any trouble, and offered no other resistance than that of sitting back in his seat, and used no harsh words; that the conductor was more loud in his talk toward the end of the conversation; that at about the time he put him off he spoke abruptly and forcibly loud; that the conductor gave him his name, and that he wrote it down; that the conductor held the car at the crossing quite a while during the time they were talking; that he went to see the superintendent of the defendant the next morning, and told him about being put off the car; that the superintendent asked him his address, and told him that Mr. Taylor (the conductor) was one of the oldest conductors on the line, and one of their most faithful men, and that the company would stand by what he did; that the conductor had the power to protect the company's prop-

erty — had a perfect right to put him off the car; that the superintendent told him that he would look the matter up, in order to see whether the money was good or not. The lady who accompanied the plaintiff at the time, in addition, testified to the effect that when the conductor showed the plaintiff the half dollar he was very angry, and seemed to get out of patience with the plaintiff because he would not get off.

Exception is taken because the court, after having stated to the jury that the plaintiff was unlawfully ejected from the car and was therefore entitled to compensatory damages, charged them that, "in addition to the compensatory damages just spoken of, in actions of this nature the jury may, if they find the testimony warrants and they deem it proper, award punitory damages or damages by way of punishment to the defendant." And again, that, "in order to warrant the jury in assessing punitory damages in addition to compensatory damages, you must find, as a matter of fact, that the conductor guilty of the wrong complained of acted in a malicious, wanton, and reckless manner, showing a disregard of the plaintiff's rights and his duties under the facts and circumstances of the case, and that the officers of the company approved and ratified such conduct on the part of their servant." And again, that "if you find and believe that the defendant's servant was guilty of malicious, wanton, and reckless disregard of the plaintiff's rights at the time of the commission of the trespass, which was ratified and approved by defendant's officers, then you would be warranted, if you deem it proper, to award exemplary damages in addition to the compensatory damages you may determine." Exception is also taken because the court refused to instruct the jury that "if you find that the conductor acted in good faith and according to the rules of the company, and was not guilty of any insulting conduct or language, or of any violence toward the plaintiff, then the plaintiff cannot re-

cover any more than actual damages." And again, that "the plaintiff is not entitled to exemplary or punitory damages in this case, if you find that the conductor was guilty of no intentional offense or wrong, and if you find that there was no oppression, malice, or wanton or reckless injury done to the plaintiff."

After careful consideration we are all clearly of the opinion that the evidence in this case did not justify the court in submitting to the jury the question of punitory damages. This court correctly held, at an early day, that "in actions *ex delicto*, in awarding the damages, the jury may take into consideration not only the actual injury sustained by the plaintiff, but where the injury is inflicted under circumstances of aggravation, insult, or cruelty, with vindictiveness or malice, in view of all such circumstances they may award exemplary or punitory damages." *McWilliams v. Bragg*, 3 Wis. 424. That rule, although at times criticised, has been steadily adhered to. *Birchard v. Booth*, 4 Wis. 75; *Cramer v. Noonan*, 4 Wis. 240; *Craker v. C. & N. W. R. Co.* 36 Wis. 677, 678; *Bass v. C. & N. W. R. Co.* 42 Wis. 654, 673; *Brown v. Swineford*, 44 Wis. 286, 287; *Corcoran v. Harran*, 55 Wis. 125; *Templeton v. Graves*, 59 Wis. 98; *Nichols v. Brabazon*, 94 Wis. 553. The circumstances under which the controversy arose between the plaintiff and the conductor were peculiar, and called for mutual forbearance. Confessedly, the piece of money received by the conductor from the plaintiff was unusual in its appearance. Such appearance at first excited suspicion on the part of the conductor, which apparently, after more careful examination, ripened into a conviction that the half dollar was not genuine, and so he informed the plaintiff and asked him to take it back and give him other money in place of it. If the result had proved the money to be counterfeit, then it would have been the right and duty of the conductor to put the plaintiff off the car if he failed to pay his fare in good money.

But the result proved that the money was genuine. That being so, the plaintiff was lawfully entitled to ride to his destination, and hence rightfully entitled to compensatory damages for being thus wrongfully ejected. There can be no reasonable doubt that the conductor tendered back the same piece of money he received from the plaintiff. It is admitted that the plaintiff at the time had another half dollar in his possession. Had he consented to make the exchange when requested, there would have been no controversy. The mere fact that the conductor, in good faith, told him that the money was counterfeit was no insult. Few are so fortunate as never to have received a counterfeit coin. It is only the passing of such coin with knowledge of the fact which makes it an offense. We find nothing in the evidence to warrant the jury in finding that the plaintiff was ejected from the car "under circumstances of aggravation, insult, or cruelty," or "with vindictiveness or malice;" and hence we must hold that the court, in the portions of the charge quoted, improperly submitted to the jury the question of punitory damages, since there was no evidence upon which to base such verdict, and also that it was error to refuse to give the instructions above quoted.

In order to recover punitory damages against the defendant, it was not only necessary to prove that the conductor's conduct was such as to subject him to such damages, but that the defendant either in advance authorized such conduct, or, with knowledge of such conduct, ratified the same. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Bass v. C. & N. W. R. Co.* 42 Wis. 654; *Eviston v. Cramer*, 57 Wis. 570. There is nothing in the plaintiff's testimony, as to the conversation which he had with the defendant's superintendent in respect to his having been put off the car, to warrant the jury in finding that the superintendent authorized or ratified any aggravating, in-

sulting, cruel, vindictive, or malicious conduct on the part of the conductor.

On the question of compensatory damages, we are constrained to hold that it was error to refuse to instruct the jury that, "in considering the question whether there was any injury to the feelings of the plaintiff, you have the right to consider his conduct and that of the conductor, and, among other things, whether or not the plaintiff sought to avoid trouble, or whether his conduct was such as tended to provoke and cause trouble unnecessarily."

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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CLAUSON, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 2 — March 20, 1900.

Surface waters: Diversion by railroad: Change of grade: Discharge through ditch: "Pond."

1. By reason of the lowering of the grade of a railroad, surface water which came upon the right of way from adjoining low lands could no longer be conducted on its natural course by culvert under the track, and was disposed of by conducting it in an ordinary ditch along the side of the roadbed for about half a mile and through a cut to a lower level on the railroad lands, where it spread out, some of it flowing upon plaintiff's land and carrying sand and gravel thereon. *Held*, that such alteration of the flow of the water must be regarded simply as an incident necessarily following the ordinary and lawful use and improvement of the railroad property, and that for the resulting injury to plaintiff's land there is no redress.
2. A "borrow pit" upon the right of way, through which the ditch ran but which did not increase or affect the flow of the water, is *held* not to be a "pond" or "reservoir" within the meaning of the rule, laid down in *Pettigrew v. Evansville*, 25 Wis. 223, and other

cases, that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it by artificial channel directly upon or in close proximity to the land of another, materially to his injury.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action for the alleged wrongful diversion of surface water, and the discharging of the same in one body upon the plaintiff's land. The facts were practically undisputed, and appeared from the evidence as follows:

In the year 1871 the defendant's railway was built, running in a general southeasterly and northwesterly direction through section 26, township 8, range 9, in the county of Dane, state of Wisconsin. The plaintiff has lands upon both sides of said right of way in said section, his house being situated upon a small parcel of land upon the southwest side of said right of way. The plaintiff's lands are lower than the roadbed of the railway where it passes through them, the roadbed being originally constructed upon a high embankment. Immediately to the southeast of the plaintiff's lands, there is a rise in the ground, through which the defendant's roadbed is situated in a cut; and further to the southeast, and about a half a mile distant from the plaintiff's land, there is again low ground on both sides of the railway track, where there was an embankment of several feet, made at the time of the original construction of the road. At this place the flow of surface water was naturally from the southwest to the northeast, and directly across the defendant's right of way, and a culvert was put in at the time of the original construction of the road, which allowed such surface water which came upon the right of way from the southwest, to pass under the track to still lower grounds in the northeast.

In 1896 the defendant company constructed a new roadbed and, for the purpose of making more easy the grade of

its road, lowered the entire roadbed, at the point where said surface waters had formerly been conducted under the track, several feet, so that such surface waters could no longer flow to the northeast except by flowing over the rails of the track. The roadbed was also lowered for a long distance to the northwest, past the plaintiff's lands, and the cut made deeper, and a ditch made on the southwest side of the roadbed, the result of which was that the surface water flowed along the southwest side of the track in said ditch, through the cut, until it reached a point on the right of way immediately opposite the plaintiff's land, where it spread out upon the surface of the ground, and a part of it ran into the plaintiff's premises, carrying some sand and gravel, and injuring about an acre of land. In its course this ditch ran through an old "borrow pit" upon the right of way, which was somewhat lower than the bottom of the ditch. A small ditch was also put along the top of the embankment on the southwest side of the track, to prevent water flowing down the side of the embankment, and the water from this ditch joined that of the first-mentioned ditch at the northwest end of the cut.

Before any testimony was taken, the defendant demurred *ore tenus* to the complaint, but the demurrer was overruled. At the close of the evidence the defendant moved that a verdict in its favor be directed, and the court submitted to the jury simply the question of damages, which the jury found to be $150. A motion for a new trial was overruled, and judgment entered in favor of the plaintiff for the damages found by the jury, with costs; from which judgment this appeal is taken.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *Mr. Hyzer*.

For the respondent there was a brief by *Rufus B. Smith* and *John M. Nelson*, and oral argument by *Mr. Smith*.

WINSLOW, J. The question of the disposal of surface water as between adjoining owners is one which is not always easy of solution, notwithstanding the fact that the basic principles governing the subject are in this state quite well settled. The doctrine of the common law was definitely adopted by this court in *Hoyt v. Hudson*, 27 Wis. 656, and that doctrine has since been closely adhered to, with perhaps a single material encroachment which will be hereafter noted. That doctrine was there stated to be that the proprietor of the lower estate may, if he choose, lawfully obstruct or hinder the flow of surface water thereon, and in so doing may turn the same back upon, or off onto or over, the lands of other proprietors, without liability for injuries resulting from such obstruction or diversion. This doctrine has been restated with some differences in language, but none in legal effect, in numerous subsequent cases. *Eulrich v. Richter*, 37 Wis. 226; *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526; *Waters v. Bay View*, 61 Wis. 642; *Lessard v. Stram*, 62 Wis. 112; *Heth v. Fond du Lac*, 63 Wis. 228; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641; *Champion v. Crandon*, 84 Wis. 405; *Borchsenius v. C., St. P., M. & O. R. Co.* 96 Wis. 448.

This principle grows out of the fundamental right which a landowner has to improve his own estate so as to fit it for his own uses. This right is well stated in *Gannon v. Hargadon*, 10 Allen, 109, in the following language, which has been several times approved by this court: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains or snows falling on its sur-

face either to stand in unusual quantities on other adjacent lands or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." Quoted with approval in *Champion v. Crandon*, 84 Wis. 409. A municipal corporation, in the improvement of its streets by paving, grading, and guttering the same, has the same right to obstruct and divert the existing flow of mere surface water that an individual owner has in the improvement of his land. *Hoyt v. Hudson*, 27 Wis. 656; *Allen v. Chippewa Falls*, 52 Wis. 433; *Heth v. Fond du Lac*, 63 Wis. 228; *Waters v. Bay View*, 61 Wis. 642; *Harp v. Baraboo*, 101 Wis. 368. A railroad corporation, in the construction of its roadbed upon its right of way, may divert, obstruct, or alter the flow of surface water in the same way and under the same rules applicable to a private owner or a municipal corporation. *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526; *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641; *Borchsenius v. C., St. P., M. & O. R. Co.* 96 Wis. 448.

None of these principles would seem to be open to debate at this time in this state, and the only exception to them, if it may be called such, is the rule laid down in *Pettigrew v. Evansville*, 25 Wis. 223, and approved in *Wendlandt v. Cavanaugh*, 85 Wis. 256, and *Schuster v. Albrecht*, 98 Wis. 241, to the effect that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it by artificial channel directly upon or in close proximity to the land of another, materially to his injury. While this rule has perhaps been somewhat modified with regard to the rights of municipalities in improving streets, it still remains the law as to private owners. *Wendlandt v. Cavanaugh, supra.* This distinction or exception may perhaps have its foundation and justification in the principle that, when surface waters so collect in a natural depression or basin forming a pond of some permanency, they thereby

lose their character as purely surface waters and acquire to some extent at least the quality of a watercourse. *Shaefer v. Marthaler*, 34 Minn. 487. Whatever the basis of the rule may be, however, it is now too firmly imbedded in our law to admit of question.

It was claimed upon the argument of this case that the facts brought the case within this principle, but this claim cannot be supported. The complaint contains no reference to the drainage of any pond, but simply charges the diversion of the surface waters which reached the defendant's right of way from other lands, as well as those which fell upon the right of way itself, through a long artificial ditch, and the discharge thereof in one body upon the plaintiff's land. It is true it appeared upon the trial that this ditch, before reaching that part of the right of way adjoining the plaintiff's land, ran through a "borrow pit" upon the right of way, the extent of which was not given, but which was somewhat deeper than the ditch. There is no evidence, however, to show that this circumstance in any way increases or affects the flow of water, but it would rather appear to the contrary. Certainly there is no lake or pond proven, either natural or artificial, which can serve to bring the case within the rule of the *Pettigrew Case*.

The case, then, is this: A railway company, for the better prosecution of its own business, has seen fit to lower the grade of its roadbed, as it had an undoubted right to do. By reason of such change certain surface water which reached its right of way from low lands to the southwest can no longer be conducted on its natural course by culvert under the track and across the right of way to the northeast, nor can such water, for manifest reasons, be allowed to flow across the rails in its wonted direction, but it is disposed of by conducting it in a ditch along the southwest side of the track for about half a mile, and through a cut, until lower ground is reached, when it spreads over the

ground opposite the plaintiff's land, and some of it, carrying sand and gravel, flows upon his land. Is this a legal wrong, or is it simply the lawful exercise of the right to fight surface water for which there is no redress even though some injury may result to an adjoining owner? We think, within the principles already laid down in the decisions of this court, it must be said that this shows simply the exercise of a right. The railroad company had the right to fix the grade of its roadbed as it did, just as a private owner has the right to change the surface or erect structures upon his land for the more complete enjoyment thereof. It is common knowledge that proper ditches are a necessity to the preservation of a roadbed in places where surface water is liable to accumulate; otherwise the roadbed would be in constant danger of being overflowed and washed away, and the safety of the traveler continually threatened. All that was done here was to construct an ordinary ditch by the side of the roadbed for a distance of about half a mile, conforming, of course, to the slope of the roadbed; the said ditch resulting in diverting the surface water which naturally reaches the southwest side of the right of way from its old-time course to the northeast, so that it now flows northwest through a cut to a lower level on the railroad lands. When it reaches this level, it spreads out, and some of it reaches the plaintiff's land, bearing sand and gravel. The proper construction of the roadbed and ditch for railway purposes is not attacked. The right to change the grade of the roadbed must be conceded. The duty to protect the roadbed from inundation by surface water is apparent. If in the exercise of this undoubted right and the performance of this plain duty in a proper manner incidental injury happens to another, it must be regarded as one of the numerous curtailments of natural privileges resulting from the complex relations of civilized life, and not an injury for which the law can provide a remedy.

The case is quite similar in its essential elements to the case of *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, but more nearly parallel to the case of *Jordan v. St. P., M. & M. R. Co.* 42 Minn. 172 (cited and approved in the *Johnson Case*), in both of which cases the conclusions reached were identical with those now reached by us. The alteration of the ordinary flow of surface water is regarded in those cases and must be regarded in this case simply as an incident necessarily following the improvement of the defendant's own property in the manner in which said property is ordinarily and may lawfully be used and improved.

By the Court.—Judgment reversed, and action remanded for a new trial.

IN RE GUARDIANSHIP OF MCCHESNEY and another: MCCHESNEY'S APPEAL.

106 315
110 633

March 2 — March 20, 1900.

Minors: Guardianship: Rights of father after divorce: Suitableness: Evidence: Testamentary guardian: Appointment by mother.

1. Where the father of minor children whose custody had been awarded to his divorced wife applied to be appointed their guardian after her death, the fact that for several years prior to the hearing, so far as morality and integrity are concerned, he had lived a correct life, is not so conclusive upon the question of his suitableness for the guardianship as to preclude the court from looking into the circumstances which led to the divorce.
2. The fact that the mother of the children had attempted to appoint their grandmother as testamentary guardian was properly considered by the court as bearing on the propriety of her appointment in case the father was found an unsuitable person for the trust. [Whether a mother to whom the custody of her minor children has been awarded by the decree divorcing her from their father has a legal right to appoint a testamentary guardian for them, under sec. 3965, Stats. 1898, authorizing the father of a child, if living, and in case of his death the mother, by last will to appoint a guardian therefor, not determined.]

3. The fact that the father had neglected to visit his dying infant son, and had permitted the funeral of the boy to be held unnoticed by him, after special pains had been taken by the mother to remove all obstacles to his visiting the dying boy and attending the funeral, is sufficient, in the absence of some clear explanation, to sustain a finding that he had no fatherly love for his remaining children.

4. A groundless suspicion expressed by the father as to the paternity of his children is entitled to weight in determining whether he is a suitable person to have their care and custody.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Proceedings for the appointment of a guardian of two minor children of Frances McChesney and the petitioner. The marriage took place in 1887. A divorce was granted in 1894. There were two infant girls, Edna Mabel and Viola Blanche, and an infant boy who died subsequent to the divorce, the custody of whom was awarded to the mother, the petitioner being required to pay to her $200 per year during their minority for their support. In 1898 Mrs. McChesney remarried to William Lappley, with whom she resided until March 31, 1899, when she died. Since such death the two girls have resided on a farm with their grandfather and grandmother, *Mr. G. De Bower* and *Mary De Bower.* The petitioner remarried in 1896, since which time he has maintained a home on a farm in Dane county, Wisconsin. The matters stated were set forth in the petition, with allegations to the effect that the *De Bowers* are unsuitable on account of their age to have the custody of the children and that the petitioner has a good home where the children can be suitably provided for and maintained. The *De Bowers* were made parties to the proceedings and answered, raising the question whether the petitioner is a suitable person to have the care and custody of the children, and whether the allegations as to their unsuitableness for the trust are true, and whether it is for the best interests of the

children to remain with them. The answer contained a prayer for the appointment of *Mrs. De Bower* as guardian of the children with the right to the custody of their persons and property during their minority.

The evidence was to the effect, and the court found, that for some years before the divorce the petitioner's conduct toward his wife was exceedingly cruel and inhuman; that he sustained, for a long period of time, immoral relations with a young servant girl in his family, and solicited other females, including his wife's mother, to submit to his adulterous desires, and that when the separation between himself and wife occurred he expelled her and her children from his house by physical force and compelled them to go, on a cold winter day, to a neighbor's house for protection, and that the circumstances of the occurrence evinced an entire absence on his part of natural parental feeling. The evidence further showed, and the court found, that from the time of the divorce to the commencement of these proceedings, *McChesney* paid but very little attention to his children; that he had been accustomed to meet them on the highway and not speak to or recognize them in any way; that he never showed any desire for their custody and little or no desire for their company or to treat them as his children in any way till these proceedings were commenced; that when his little boy was sick unto death he was notified of the fact by the mother in order that he might see his son before death occurred; and that after the child died he was notified of the funeral, but that he entirely ignored both of such occurrences, paying no attention to the funeral of the boy though he knew of its occurrence and was in the vicinity where he could readily have attended.

The only evidence to palliate *McChesney's* conduct in regard to his children, as found by the court, was that on one or two occasions during the life of the mother she indicated that she preferred that he should not have anything to do

with the children, and that the *De Bowers*, on one or two occasions, repelled his advances in regard to recognizing the children in a fatherly way, and indicated displeasure because he noticed them. There was further evidence, and the court found, that the petitioner is a man of considerable property and has a good home. The evidence further showed that the petitioner's conduct since his second marriage, aside from that toward his children, has been proper; and that he enjoys the confidence and respect of his neighbors.

The evidence further showed, and the court found, that for a considerable time before the death of the mother the children resided with the *De Bowers;* that it was the mother's desire, as indicated in her last will and testament, that her mother, *Mrs. De Bower*, should have the care of the girls during their minority; that by reason of the wish so expressed the children, from the death of their mother, have resided with their grandmother and are very much attached to her and to their grandfather also, and that the grandparents are very much attached to the children; that the grandparents have an excellent home and are of sufficient ability in every way to properly care for the children during their minority, and that the children are desirous of remaining with the grandparents.

On the facts found as indicated and the evidence the court denied the prayer of the petitioner and granted the prayer of the respondents. An order was thereupon entered accordingly appointing *Mrs. De Bower* guardian of the children to have the custody of their persons and property upon her giving a bond as indicated in the order. The petitioner appealed.

For the appellant there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*.

For the respondents there was a brief by *R. M. La Follette* and *G. E. Roe*, and oral argument by *Mr. La Follette*.

MARSHALL, J. There are no legal questions that need be discussed on this appeal. It is conceded that the mother, who was awarded the custody of the children in the divorce action, being dead, the petitioner, as the only living parent, is entitled under the statute to be appointed their guardian, if competent to transact his own business and not otherwise unsuitable within the meaning of sec. 3964, Stats. 1898. As regards the first requisite there is no question, so the case comes down to the second. Independent of the petitioner's ability to transact his own business, is he a suitable person to be intrusted with the care and custody of the two infant girls, whose guardianship he seeks? That is the question and is purely one of fact. It is conceded that if the findings in that regard are sustained by the evidence the decision of the trial court is right. We have examined the evidence with care and are unable to say that any material finding is contrary to the clear preponderance thereof.

Complaint is made because the court permitted evidence regarding the character of the petitioner at the time of the divorce decree and prior thereto. It is by no means certain that if all such evidence were out of the record the order appealed from could properly be disturbed, but we cannot say error was committed in receiving it. The trial court had broad discretionary power regarding the limits of the inquiry reasonably necessary to a correct determination of the controversy calling for a decision. The history of the petitioner's life from the date of the marriage down to the hearing had a bearing on that controversy. True, the fact that he, for several years prior to the hearing, so far as morality and integrity are concerned, had lived a correct life, was a strong circumstance in his favor, but it would be going too far to say that it established his character and suitableness for the guardianship of the infant girls so conclusively as to preclude the court from looking into the circumstances

that led to the decree divesting him of their custody and placing them with their mother.

It is useless to discuss here at length the circumstances referred to; they appear sufficiently in the findings of the court and are included in substance in the statement preceding this opinion. Suffice it to say that they are of such a character that it is not unreasonable to hold that a probationary period of more than six years would be required to so obliterate their effect upon the petitioner's suitableness to have the care and custody and education of infant girls as to preclude giving any weight to them in determining his character in that regard.

It is said the court gave undue weight to the expressed wishes of the children to remain with the grandparents. We cannot tell how that is. There is no indication in the record of what significance the court gave to the children's wishes. It is not suggested but that it was entirely proper to inquire of the children, as was done, as to their state of mind as regards being taken from their grandparents. We observe in the finding merely a brief statement that "the children, as expressed by them on the trial, are desirous of remaining with their grandparents, to whom they are warmly attached." There is nothing in that to indicate that the children's wishes were regarded as controlling in any sense.

Error is assigned on the admission in evidence of the mother's will attempting to appoint *Mrs. De Bower* the testamentary guardian of the children: (1) Because the conditions greatly changed after the making of the will. (2) Because the wishes of a deceased parent are of little weight as against the right of the survivor. (3) Because the mother had no right to appoint a testamentary guardian. In answer to all these suggestions it may be said that the evidence was not treated as vital to the case. Answering the propositions in detail we say, as to the first, the will speaks from

the death of the testator and must be presumed to express the wishes she entertained at that time; as to the second, that at most it only goes to the weight of the evidence; and as to the last proposition, that the evidence was not received or considered as proof of a rightful legal disposition of the children.

Sec. 3965, Stats. 1898, expressly authorizes the father of a child, if living, and in case of his death the mother, by last will to appoint a guardian therefor. That indicates the legislative policy to be that the parent entitled to the custody and care of a child during its minority shall have the right to appoint a testamentary guardian therefor. It is not necessary to say here that, since the decree of divorce removed the children of the petitioner from his control and placed them in the care and custody of the mother, his right as regards appointing a testamentary guardian for them was thereby taken from him and the right of the mother was substituted instead thereof. Such is the effect of some adjudications elsewhere. Hochheimer, Custody of Infants, § 78; *Wilkinson v. Deming*, 80 Ill. 342.

There can be no question but that the decree of divorce suspended the statutory power of the petitioner to control the custody of his children by his last will and testament, and that the spirit of it is, that the mother, the father being disabled from acting, may appoint a testamentary guardian. But whatever may have been the exact legal status of the mother in that regard, it is considered that, because of the legislative policy that she shall have the right where the father is so circumstanced that he cannot exercise the power of testamentary appointment, it was proper to consider her wishes, expressed in her will, not as warranting a denial of the right of petitioner to the custody of his children, but as bearing on the propriety of granting the prayer of *Mrs. De Bower* to be appointed guardian of the children in case the

petitioner's claim was not sustained because of his unsuitableness for the trust.

A further contention is made, that the court erred in deciding that the appellant is wanting in natural affection for the children. The evidence on that point abundantly supports the finding. Many circumstances bearing on the subject and indisputably established might be mentioned. The occurrences, unexplained and unexplainable consistent with natural parental feelings and conceptions of duty, of the appellant's neglect to visit his dying infant son, and of permitting the funeral of the boy to be held unnoticed by him and with less concern than one would naturally have for the funeral of a stranger happening in his vicinity, after special pains were taken by the stricken mother to remove all obstacles to his visiting the dying boy and being present at the funeral, are sufficient in themselves, in the absence of some clear explanation of such conduct, to prevent the finding from being disturbed that the appellant has no fatherly love for the children whose custody he seeks. It seems that no man could be so hardened toward his own flesh and blood, where represented by a child so young as to be free from any intelligent bias against him by reason of a hostile environment, as appellant's conduct indicates. The fact that the appellant so conducted himself suggests the probability that the groundless suspicion the evidence shows he had expressed as to the paternity of the children, or some of them, influenced him, which of itself, as has been held, is entitled to weight in determining whether he is a suitable person to have their care and custody. *Sheers v. Stein*, 75 Wis. 44.

We will not further discuss the findings or the evidence. The following is the situation, in brief, as appears by the record: The appellant, by his conduct, forfeited the control of his children and the decree to that effect stands undisturbed. He came before the court with a mere claim of

legal right to be preferred as the nominee for the guardianship of the children, since circumstances had arisen that rendered the appointment of a guardian necessary. They being under the age of choice, it was the duty of the court to make a choice for them, and to do so having regard for their best interests as the primary consideration and the legal right of the appellant to be chosen if suitable for the trust. In determining the propriety of appointing the appellant, since such appointment would take the children away from the home in which they were pleasantly located, and where they were reasonably certain of having proper parental care, and place them among those who were comparative strangers to them, such facts were entitled to consideration. The appellant has a second wife and family of children, so it is not certain that the two girls could be received there and permanently treated on an equality with the other child members of the household. Though appellant is now an upright man so far as regards morality and integrity, his past life cannot be entirely ignored. It is entitled to some consideration in determining whether he is a suitable person under all the circumstances for the trust he seeks. He does not possess natural love and affection for the children, and the circumstances of the situation render it quite probable that fatherhood is not the moving cause of his present desire to control them. The children were placed legally by the court where the mother, by an attempted testamentary disposition of their custody during their minority, placed them. Such testamentary disposition was in accord with the spirit of the statute as regards the right of the mother, and, though not binding upon the court, was entitled to consideration, since thereby the best interests of the children were conserved and there was no legal impediment, clearly, in the way. The grandparents and the children are warmly attached to each other, so that the relations between them are akin to those between par-

ent and child under normal conditions. The ability of the grandparents to care for the children is equal to that of the appellant, and their disposition to do so, independent of all selfish impulses, is manifestly superior to his. In view of all the things stated, within all the authorities, the court properly decided that the appellant had no legal right to be selected as guardian of the children, that the proper place for them was with their grandparents, and the proper person to have their legal guardianship was their grandmother. The cases in our own court so fully cover the subject, so far as the law is concerned, that it is considered that there is no need of going elsewhere for authority. *In re Goodenough*, 19 Wis. 274; *Sheers v. Stein*, 75 Wis. 44; *Johnston v. Johnston*, 89 Wis. 416; *Markwell v. Pereles*, 95 Wis. 406.

By the Court.— The order appealed from is affirmed.

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HILDEBRAND, Plaintiff in error, vs. CARROLL, Defendant in error.

March 3 — March 20, 1900.

Bailments: Injury to property while in possession of bailee: Evidence: Hearsay: Negligence: Burden of proof.

1. The issue being whether a horse was foundered while in the possession of defendant as bailee, it was prejudicial error to permit the defendant to testify, against objection, that a person experienced in handling horses, who examined the horse while in defendant's possession, told him that the founder was an old one and to drive the horse home.
2. When a bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, proof that it was returned in a damaged condition, and that the injury was such as does not ordinarily occur without negligence, establishes a *prima facie* case of negligence against the bailee, and puts upon him the burden of showing to the contrary.

ERROR to review a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action to recover damages for injury to a horse. The plaintiff is a livery-stable keeper in the city of Portage. In August, 1898, the defendant hired a team from him to drive to Montello, a distance of about twenty-two miles. He made the trip, and returned the team on the evening of the following day. When returned, one of the horses was foundered. The plaintiff seeks to recover damages for this injury on the ground of defendant's negligence. The jury found for defendant, and to review certain errors occurring on the trial the plaintiff has brought the case to this court by writ of error.

Daniel H. Grady, for the plaintiff in error, to the point that it was error to refuse to instruct, upon request, that if the jury found "that the horse in question was delivered to the defendant in good condition, and returned in a damaged state, there is cast upon the defendant the burden of showing that the loss or injury did not occur through his negligence," cited, besides cases cited in the opinion, *Baren v. Cain*, 15 Ill. App. 387; *Burlingame v. Horne*, 30 Ill. App. 330; *Cass v. B. & L. R. Co.* 14 Allen, 448; *Goodfellow's Ex'rs v. Meegan*, 32 Mo. 280; *Taussig v. Schields*, 26 Mo. App. 318; *Beardslee v. Richardson*, 11 Wend. 25; *Scranton v. Baxter*, 4 Sandf. 5; *Fox v. Pruden*, 3 Daly, 187; *Burnell v. N. Y. C. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Bank of Oswego v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634; *Ouderkirk v. Cent. Nat. Bank*, 119 N. Y. 263; *Williamson v. N. Y., N. H. & H. R. Co.* 24 Jones & S. 508; *Winteringham v. Hayes*, 3 Misc. (N. Y.), 604; *Nichols v. Balch*, 8 Misc. (N. Y.), 452; *Koch v. Nat. Exp. Co.* 1 Lack. Leg. News, 289; *Clark & Co. v. Spence*, 10 Watts, 335; *Safe D. Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660; *Gleason v. Beers*, 59 Vt. 581, 59 Am. Rep.

757; Story, Bailments, §§ 406–411, and cases cited; *Bennett v. O'Brien*, 37 Ill. 250.

For the defendant in error there was a brief by *Fowler & McNamara*, and oral argument by *C. A. Fowler*.

BARDEEN, J. 1. On the trial the defendant was permitted, against plaintiff's objection, to testify that Mr. Goff, who examined the horse at Montello, told him that it was an old founder, and to take the horse and drive it home. One of the main facts in controversy was whether the horse had become injured while in defendant's possession. While the evidence regarding the condition of the horse prior to the hiring is vague and unsatisfactory, there is evidence from one witness that he "was in good condition" when delivered to defendant. The man Goff had had thirty-five or forty years' experience in handling and trading horses, and had been called to examine the horse in question. To permit the defendant to relate to the jury the conclusion he had come to with relation to the very matter that was at issue was allowing him to establish his defense by hearsay. The matter was material, and bore directly upon the controversy the jury was to determine. It requires no argument or citation of authorities to demonstrate the harmful character of such evidence. Its reception was erroneous and contrary to the rules of evidence.

2. It is also urged as error that the court refused to permit the plaintiff to testify in rebuttal as to certain admissions made by the defendant to him. Under the circumstances it was plainly a matter of discretion with the trial court. We perceive no ground for saying that such discretion was abused.

3. The plaintiff submitted the following request to instruct the jury, which was refused: "You are charged that, if you find that the horse in question was delivered to the

defendant in good condition and returned in a damaged state, there is cast upon the defendant the burden of showing that the loss or injury did not occur through his negligence." The court, however, gave the following instruction, which was excepted to: "You are instructed that the burden of proof is on the plaintiff to show not only injury to the horse, but also that the injury resulted from a want of ordinary care on the part of the defendant; that is, it is incumbent to be shown by the testimony — by a preponderance of the evidence — that the horse was injured, and that it resulted from the want of ordinary care on the part of the defendant." The request and the instruction given fairly raised the question frequently referred to in the books as to the "burden of proof" in cases of this kind. The general rule in actions for negligence is that the burden of proof is upon the party asserting it. The rule in this state is carried to the extent of holding that the burden of proving contributory negligence is upon the party asserting it. *Randall v. N. W. Tel. Co.* 54 Wis. 140.

In speaking of the relative duties and obligations of bailors and bailees, some confusion has arisen in the books as to the burden of proof to establish negligence. Technically speaking, that burden always rests upon the plaintiff. But there are certain classes of bailments, when the property is in the exclusive possession of the bailee, and the property is returned damaged, in which it is said the law casts upon the bailee the burden of showing that the loss did not occur through his negligence. The authorities are by no means harmonious on this question. The ancient rule and older decisions are to the effect that the loss or injury raises no presumption of negligence. The more modern decisions hold that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. 3 Am. & Eng. Ency. of Law (2d ed.), 750, and cases. It is not our purpose to review or attempt to reconcile these

decisions. This court, never having passed upon the rule properly applicable to the facts in this case, feels at liberty to adopt one that will fully meet its requirements, and still preserve harmony in the law of negligence. We therefore hold that when the bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, and the property is returned in a damaged condition, and it is shown that the injury is such as does not ordinarily occur without negligence, proof of these facts establishes a *prima facie* case against the bailee to put him on his defense. In other words, when such a showing is made, the plaintiff has made a *prima facie* case under the rule that the burden is on the party asserting negligence; and the law will then presume negligence to have been the cause, and casts upon the defendant the burden of showing the loss did not occur through his negligence, or, if he cannot affirmatively do this, that, at least, he exercised a degree of care sufficient to rebut the presumption of it. Thus it will be seen that, upon proof of the facts mentioned, a *prima facie* case is made, and the law then shifts the burden to the defendant to rebut it. The following authorities may be noted in support of this conclusion: Lawson, Bailments, § 332; Story, Bailments, § 410, note; Jones, Ev. § 184; *Collins v. Bennett*, 46 N. Y. 490; *Arnot v. Branconier*, 14 Mo. App. 431; *Parry v. Squair*, 79 Ill. App. 324; *Cumins v. Wood*, 44 Ill. 416; *Logan v. Mathews*, 6 Pa. St. 417; *Funkhouser v. Wagner*, 62 Ill. 59; *Mills v. Gilbreth*, 47 Me. 320. See *Donlon v. Clark*, 23 Nev. 203; *Ford v. Simmons*, 13 La. Ann. 397; *Boies v. H. & N. H. R. Co.* 37 Conn. 272; *Wiser v. Chesley*, 53 Mo. 547; *Winteringham v. Hayes*, 144 N. Y. 1. See *Hill v. Am. S. Co.* 107 Wis. 19. A contrary rule is asserted in some of the states, but the one announced is supported by a more numerous array of authorities, and is deemed the more reasonable.

Under this rule the instruction requested would not have been proper, as it omits any reference to the question of the

bailee's exclusive possession, and also the necessity of a showing by plaintiff that the loss was such as would not ordinarily occur without negligence of the bailee. The instruction given, however, was faulty, as carrying the rule to the other extreme. The burden was imposed upon plaintiff not only to show the injury complained of, but that such injury resulted from the defendant's want of ordinary care. Under these instructions the duty of defendant to explain as to the injury to the horse, if the jury believed that such injury would not have resulted from ordinary use, was not fairly submitted to them, and hence was prejudicial to the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

RUSSELL and another, Appellants, vs. THE FALLS MANUFACTURING COMPANY, Respondent.

March 3 — March 20, 1900.

Sale of chattels: Contract: Acceptance.

1. On May 27th, plaintiffs' agent took from defendant an order for flour, subject to plaintiffs' approval, "to be shipped out any time between now and July 1st, when ordered by" defendant — "terms, thirty days from shipment." On the same or the next day plaintiffs replied by letter accepting the order but specifying, as the terms, that the flour was "to be shipped some time in June . . . on thirty days acceptance without interest, and if longer time wanted eight per cent. interest after thirty days." *Held*, that this was a material modification of the terms of the order, and therefore constituted a new offer, not binding on the defendant until accepted.
2. In such a case, mere silence on the part of the vendee after receipt of the vendors' response could not be construed as an acceptance of their modified proposal.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

On May 27, 1898, plaintiffs' traveling salesman took a written order from the defendant in the following words: "Oconto Falls Manufacturing Co.: Bought of Russell Bros. one car of flour, to be shipped out any time between now and July 1st, when ordered by the Oconto Falls Mfg. Co. Terms, thirty days from shipment. [Descriptions and quantities.] Subject to the approval of Russell Bros., and they are to notify the Oconto Falls Mfg. Co. at once if they accept of order. FALLS MFG. CO., W. L. E." On the same or the next day plaintiffs replied by the following letter: "Your order received, given our Mr. Parish, and will accept same, to be shipped some time in June, 1898. We suppose Mr. Parish gave you our terms,—all goods sold on thirty days' acceptance without interest, and if longer time wanted eight per cent. interest after thirty days. (All acceptance dated same day as invoice & B. L.) to be signed and returned as soon as car is unloaded." No response was made until June 10, 1898, when the defendant sent the following: "Please cancel our order for flour, which was to come in some time this month, as we have decided to continue buying the same flour we have been using. We are informed that the flour you are making would not be suitable to our trade." Plaintiffs immediately replied, denying right to cancel; saying both parties were bound by the foregoing order and acceptance, and that they should hold the flour until July 1st, and then, if not ordered, sell it on defendant's account, and hold defendant for the difference. On June 17th defendant again wrote, insisting on its cancellation, and declaring that it would not order the flour; and plaintiffs again replied that they would insist on the contract. After July 1st plaintiffs sold the flour at a loss of some $267. At the close of the plaintiffs' evidence, judgment of nonsuit was rendered, from which plaintiffs appeal.

For the appellants there was a brief by *Nugent & Baker*, and oral argument by *A. A. Nugent.*

For the respondent there was a brief by *Dawson & Chopin*, and oral argument by *G. H. Dawson*. They argued, among other things, that to constitute a binding contract there must be a definite proposition made on the one side and accepted on the other, and the acceptance must be absolute, unqualified, and unconditional, for if it adds conditions, however slight, it is not sufficient and no contract is made. *N. W. I. Co. v. Meade*, 21 Wis. 474; *Greve v. Ganger*, 36 Wis. 369; *Baker v. Holt*, 56 Wis. 100; *Sawyer v. Brossart*, 67 Iowa, 678, 56 Am. Rep. 371; *Rommel v. Wingate*, 103 Mass. 327; 1 Parsons, Contracts, 476; Bishop, Contracts, § 323. Defendant was not bound to notify plaintiffs of its refusal to accept their counter proposal. *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35.

DODGE, J. The plaintiffs' response to the defendant's written order contained material modifications. The specification of terms slightly different from those used in the order could have been intended for no other purpose than to modify the order; otherwise, the response need have gone no further than the expression, "We accept." That specification of terms was, first, that the flour was "to be shipped some time in June," while the order required that it should be shipped out any time between March 27th and July 1st *when ordered by the defendant*. Again, the terms of payment in the order were thirty days from shipment. Plaintiffs' response industriously insisted on their terms of a thirty-days *acceptance* without interest, to be dated the same day as the invoice and bill of lading, and to be signed and returned as soon as the car was unloaded. The distinction between an open account and an "acceptance" is material; for the word acceptance fairly implies a piece of commercial paper, which might then pass into the hands of an innocent holder and deprive defendant of defenses if any should develop within the thirty days. Thirdly, the plaintiffs'

letter imposed upon any delinquency, after the thirty days, interest at the rate of eight per cent., which was not tendered by the offer, from the terms of which only six per cent. penalty would result.

The terms of the order being substantially modified in the plaintiffs' response, that did not close a contract, but constituted merely a new offer, not binding until itself accepted. True, acceptance would readily be inferred from any conduct on defendant's part indicative thereof. Doubtless had it ordered any of the flour after receiving plaintiffs' letter, that would have sufficed; but mere silence bears no such significance, and defendant's first utterance after plaintiffs' counter offer was a withdrawal of its original order, and was inconsistent with any idea of a binding contract. There is no evidence, therefore, that the minds of the parties ever met so as to form a mutual contract of purchase and sale, either on the terms of defendant's order or plaintiffs' counter offer, and nonsuit was properly granted.

By the Court.—Judgment affirmed.

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BINDER, Respondent, vs. McDONALD, Assignee, Appellant.

March 3 — March 20, 1900.

Appeal from order: Return: Refusal to exercise discretion: Bankruptcy act: Suspension of state insolvency laws: Voluntary assignment: Dissolution of attachment.

1. An order refusing to dissolve an attachment, and the order to show cause upon which it was based, each recited that it was based on certain specified papers and the records and files in the case. On appeal the clerk certified that the papers annexed were "the original and all the papers and pleadings filed" in his office "in the above-entitled cause," except certain pages of the record which were certified to be true copies. *Held*, sufficient to identify the records and papers upon which the order was based.

2. Where the trial court has power, in its discretion, to do an act, a refusal to exercise such discretion on the ground that it has no such power is an error of law for which the order will be reversed; but the supreme court will not determine in what way such discretion should be exercised.

3. The mere enactment of the federal bankruptcy act of 1898 did not *ipso facto* suspend the operation of all state insolvency laws, or prevent the making of a voluntary assignment for the benefit of creditors, especially under a state law like ch. 80, Stats. 1898, which prohibits preferences except for six months' wages of employees,—although such an assignment would be voidable by proceedings under the bankruptcy act.

4. Under sec. 1694*a*, Stats. 1898 (providing that all attachments levied within ten days prior to the making of a voluntary assignment shall be dissolved and the property turned over to the assignee or receiver), our state courts still have jurisdiction, if there have been no proceedings in bankruptcy under the federal act, to determine a motion by the assignee to dissolve such an attachment.

5. Not the whole of ch. 80, Stats. 1898, is to be regarded as an insolvency law, but only certain features thereof. Remarks in *Holton v. Burton*, 78 Wis. 326, and *Second Ward S. Bank v. Schranck*, 97 Wis. 258, limited.

6. The right to make a voluntary assignment for the benefit of creditors, when not forbidden by statute, is inherent in a corporation as well as in an individual, and exists independent of the insolvency features of ch. 80, Stats. 1898.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there were briefs by *Felker, Stewart & McDonald*, and oral argument by *C. W. Felker*.

For the respondent there was a brief by *M. J. Wallrich* and *C. F. Dillett*, and oral argument by *Mr. Wallrich*.

CASSODAY, C. J. It appears from the record that prior to July, 1899, the defendant Wittenberg Veneer & Panel Company was duly incorporated and organized under the laws of this state; that July 23, 1899, its factory was destroyed by fire; that the same was insured for upwards of $12,000, and that all of such insurance was put up as collateral secu-

rity to certain banks; that July 27, 1899, the plaintiff, *Binder*, commenced this action to recover $579.74 due on express contract from such corporation and one Thomas E. Daskam, and caused an attachment to be issued therein and levied upon certain real estate therein described and certain personal property; that the ground upon which such attachment was issued is to the effect that such corporation had assigned, conveyed, disposed of, or concealed, or was about to assign, convey, dispose of, or conceal, its property, or some part thereof, with intent to defraud its creditors, and that it fraudulently contracted the debt and incurred the obligation; that August 1, 1899, that corporation made a voluntary assignment of all its property for the benefit of its creditors to the defendant *Charles H. McDonald;* that August 11, 1899, *Charles H. McDonald*, as such assignee, traversed such attachment; that August 26, 1899, upon the verified petition of *McDonald* as such assignee, and upon the records and files in the case, the plaintiff was ordered to show cause September 7, 1899, why such attachment should not be dissolved and the attached property turned over to *McDonald* as such assignee; that upon the hearing of such motion, September 7, 1899, and upon such verified petition, records, and files, and the affidavits of M. J. Wallrich, Thomas E. Daskam, and A. H. Anderson, the court ordered that such motion be, and the same was thereby, denied, with $10 costs of motion, to be paid to the plaintiff's attorney.

In denying such motion the court filed a written opinion, which, under the title of the cause, is as follows: "Motion under section 1694*a*, R. S., to dissolve an attachment levied within ten days before the making of a voluntary assignment. The controlling question upon this motion is whether the existence of a federal bankruptcy law in full force and effect suspends the operation of chapter 80 of the statutes of this state, which chapter includes the section above mentioned. It seems to be well settled that the exercise by

Congress of the power conferred upon it by the constitution of the United States by the enactment of a general bankruptcy law *ipso facto* suspends the operation of all state insolvency laws. This raises the question whether chapter 80 is an insolvency law or not. My conclusion is that, with the additions and amendments which have from time to time been made to said chapter 80, it is an insolvency law, and that all of its provisions are now suspended and rendered inoperative by the existence of a general or federal bankruptcy law. For this reason alone, and without deciding any other question in the case, the motion is denied on the usual terms."

We are asked to dismiss the appeal because the clerk's certificate does not "show that the papers returned are the originals, or copies used on the hearing of the motion for the order from which the appeal is taken." It does show, however, that the papers annexed "are the original and all the papers and pleadings which have been filed" in his "office in the above-entitled cause, except pages 1 to 13, inclusive, of the record, which are copies of the originals;" and the clerk also certifies that the thirteen pages have been carefully compared with the original record on file in his "office, and that the same are true and correct copies of the originals, and of the whole thereof." Such certificates and the order to show cause, mentioned in the statement, and the recitals in the order appealed from, also mentioned therein, would seem to be sufficient to identify the records and papers upon which the order was based. Circuit Court Rule XI.

Besides, we are not called upon to determine whether the trial court should have dissolved the attachment upon the merits, since, as indicated in the statement, that court denied the motion solely on the ground that it had no power to determine the question. This court has held that: "Where the trial court has power, in its discretion, to do an act, a

refusal to exercise such discretion on the ground that it has no such power is an error of law for which its order will be reversed; but this court will not determine in what way such discretion should be exercised." *Smith v. Dragert*, 61 Wis. 222. To the same effect, *Whitham v. Mappes*, 89 Wis. 671. The question, therefore, recurs whether the trial court had power to determine upon the merits the application to dissolve the attachment.

As indicated, the trial court held that the passage of the federal bankrupt law, July 1, 1898, *ipso facto* suspended the operation of all state insolvency laws, including sec. 1694*a*, Stats. 1898, wherein it is provided that if an insolvent debtor make a voluntary assignment for the benefit of his creditors within ten days after his property has been "attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such debtor, . . . all such attachments, levies, garnishments or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver." The effect of the passage of such federal bankrupt law upon such state laws is, manifestly, a federal question, which may be ultimately determined by the supreme court of the United States. Until such determination by that court we must be governed by the import of its former decisions, and such aid as we may find in the decisions of other courts, and the law and reasons applicable to the case. After very able arguments and great deliberation, it was determined by the supreme court of the United States more than seventy years ago, that: "The power of Congress 'to establish uniform laws on the subject of bankruptcies throughout the United States' does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by Congress and the state laws conflict with those of Congress." *Ogden v. Saunders*, 12 Wheat. 213. See, also, *Tua v. Carriere*, 117 U. S. 201; *Cole v. Cunningham*, 133

U. S. 114; *Brown v. Smart*, 145 U. S. 457. Pending the bankrupt act of 1867, it was held by that court that "an assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees." *Mayer v. Hellman*, 91 U. S. 496.

Notwithstanding the provision of the Revised Statutes of the United States giving to the federal courts exclusive jurisdiction: "6. Of all matters and proceedings in bankruptcy" (sec. 711), yet it was held, pending the bankrupt act of 1867, that the assignee in bankruptcy might sue in the state courts to recover the assets of the bankrupt; that although exclusive jurisdiction in such cases might be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to; and that such jurisdiction of a state court is derived from its own constitution and laws. *Claffin v. Houseman*, 93 U. S. 130. To the same effect is *McKenna v. Simpson*, 129 U. S. 506, where it was held that "a state court has jurisdiction of an action brought by an assignee in bankruptcy to set aside, as made to defraud creditors, conveyances made by the bankrupt before the bankruptcy." These cases may be in conflict with some things said by this court in *Brigham v. Claflin*, 31 Wis. 607; *Bromley v. Goodrich*, 40 Wis. 131. The case in the supreme court of the United States peculiarly applicable here is *Boese v. King*, 108 U. S. 379, where it was held that: "A general assignment of a debtor's property, made for the benefit of creditors, purporting to be made under a state insolvent law which had, at the time of the assignment, been suspended in whole or in part by a bankrupt act, may never-

theless be sustained as sufficient to pass a title to assignees in the absence of proceedings in bankruptcy impeaching it, or of appropriate steps by the assignor for its cancellation." It was further held in that case that such an assignment, "made without intent to hinder, delay, or defraud creditors, is valid for the purpose of securing an equal distribution of the estate of the assignor among his creditors in proportion to their several demands, *except as against proceedings* instituted under the bankrupt act for the purpose of securing the administration of the property in a bankruptcy court." It is true that four of the justices dissented in that case on the ground that the insolvent law of New Jersey there in question was in conflict with the bankrupt act of 1867; but the decision of the court, we apprehend, is to be observed as the law by all inferior tribunals.

In the case at bar there is nothing in the record to indicate that any proceeding in bankruptcy has ever been commenced, much less pending. Of course, as against such proceedings under the bankrupt act, properly instituted, the assignee for the benefit of creditors and the state courts would readily yield to the paramount jurisdiction of the bankrupt court. *Blake, Moffitt & Towne v. Francis-Valentine Co.* 89 Fed. Rep. 691; *In re Bruss-Ritter Co.* 90 Fed. Rep. 651; *In re Sievers*, 91 Fed. Rep. 366; *In re Curtis*, 91 Fed. Rep. 737; *In re Smith*, 92 Fed. Rep. 135; *In re John A. Etheridge F. Co.* 92 Fed. Rep. 329; *In re Pittlekow*, 92 Fed. Rep. 901; *In re Curtis*, 94 Fed. Rep. 630; *In re Richard*, 94 Fed. Rep. 633. As held in the federal court in Massachusetts: "A general assignment for the benefit of creditors, though an act of bankruptcy and liable to be avoided by the subsequent adjudication of the assignor as a bankrupt, is not void originally, but only voidable. It remains valid until such adjudication is made." *In re Romanow*, 92 Fed. Rep. 510. To the same effect, *In re Ogles*, 93 Fed. Rep. 426; *In re Wright*, 95 Fed. Rep. 807; *Simonson v. Sinsheimer*, 95 Fed.

Rep. 948. Perhaps as extreme a case as any is the late Massachusetts case cited, where it was held that the provisions of the present bankrupt law that "this act shall go into full force and effect upon its passage" "so far supersedes the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain the petitions for the commencement of insolvency proceedings filed after said date." *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 1 Am. Bankr. Rep. 39, and note. No reference is made in that case to *Boese v. King* and other cases in the supreme court of the United States pending the bankrupt act of 1867, and cited above. We do not understand that the act goes so far as to prevent the making of a voluntary assignment for the benefit of creditors, especially under a state law like ours, which prohibits preferences, except a limited amount for wages to employees. As stated by Mr. Justice GRAY in one of the cases cited: "Each state, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction." *Brown v. Smart*, 145 U. S. 457. True, this was said in reference to state insolvent laws in the absence of a national bankrupt law; but, as indicated by the adjudications cited, that law only supersedes such state laws or parts of state laws as are in conflict with it. Here the plaintiff, under the state law, seized property of its debtor on an attachment. Four days afterwards the debtor, under the state statute, made a voluntary assignment for the benefit of its creditors. Thereupon the assignee under the statute cited moved to dissolve the attachment, and the court held that it had no power to decide the question, even in the absence of any proceedings in bankruptcy. Although the making of the assignment was an act of bankruptcy, avoidable by proceedings in bankruptcy, yet, in our judgment, neither that assignment nor the motion to dissolve

the attachment was a matter or proceeding in bankruptcy within the meaning of the federal statutes and the federal adjudications cited.

Perhaps the learned trial judge was induced to decide as he did by reason of certain expressions found in some of the decisions of this court from which it might be inferred that the whole of ch. 80, Stats. 1898, is to be regarded as an insolvent law. *Holton v. Burton*, 78 Wis. 326; *Second Ward S. Bank v. Schranck*, 97 Wis. 258. Such was not the intention. What is thus stated in those cases must be regarded as relating to the insolvency features of that statute. The right to make such voluntary assignment for the benefit of creditors, when not forbidden by statute, is inherent in a corporation as well as an individual, and existed independent of the insolvency features of that chapter. *Vanderpool v. Gorman*, 140 N. Y. 563; *Garden City B. & T. Co. v. Geilfuss*, 86 Wis. 612.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

MANTHEY, Respondent, vs. SCHOOL DISTRICT NO. 6 OF THE TOWN OF COMMONWEALTH, Appellant.

March 3—March 20, 1900.

Schools: Contracts: Action by board.

Under sec. 432, Stats. 1898 (providing that no act authorized to be done by the school board shall be valid unless voted at its meeting), a contract which was never authorized by any vote or at any meeting is void, although signed by all the members of the board.

APPEAL from a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Max Sells*, attorney, and *A. W. Shelton*, of counsel, and oral argument by *Mr. Shelton*.

For the respondent the cause was submitted on the brief of *John O'Hara*.

WINSLOW, J. The plaintiff is a qualified school teacher, and brought this action to recover damages for the breach of a written contract alleged to have been made by her with defendant's school board to teach the district school for nine months, commencing September 13, 1897. There was no dispute in the material facts. The contract was in due form, and was signed by the director, treasurer, and clerk of the defendant district, and by the plaintiff, but was never authorized by any vote or at any meeting of the district board. The plaintiff taught six months, and was paid therefor by orders in the usual way, but was then discharged by the board. A verdict for the plaintiff for the amount of damages shown on account of the refusal to allow her to teach for the remaining three months was directed, and judgment rendered on the verdict.

It is clear that the verdict was wrongly directed. The case is identical in its essential facts with the case of *McNolty v. School Directors*, 102 Wis. 261, and is ruled thereby. The board could only make the contract in the manner provided by sec. 432, Stats. 1898. That section provides that "no act authorized to be done by the board shall be valid unless voted at its meeting." The alleged contract in this case was therefore void, and no rights can be based upon it.

By the Court.—Judgment reversed, and action remanded for a new trial.

BARTELL, Plaintiff in error, vs. THE STATE, Defendant in error.

March 3 — March 20, 1900.

Criminal law and practice: Assault and battery: "Magnetic healer:" Exposure of person of female: Evidence: Qualification of experts: Immaterial error: Private prosecutor: Instructions to jury.

1. In a prosecution for an assault and battery alleged to have been committed by a "magnetic healer" upon a female patient, to whom he was giving massage treatment, by fraudulently inducing her to expose her person to him for his lewd personal gratification, the testimony of physicians that they were familiar with the massage treatment, the methods employed in giving it, and the reasonable requirements on the part of the patient in order to receive it, is *held* sufficiently to show that they possessed special knowledge qualifying them to testify, as experts, as to the necessity of the exposure of the person of the patient and the custom in that regard where the patient was a woman and the operator a man.
2. The exclusion of evidence in such case that the defendant had cured a person by his method of treatment was not harmful, where the jury were distinctly instructed that the only question for them to decide was whether defendant was acting in good faith on the occasion in question, or whether he needlessly caused the patient to submit her body to him for the gratification of his evil desires.
3. District attorneys being expressly exempted by subd. 2, sec. 752, Stats. 1898, from the duty of prosecuting persons charged with assault and battery, it was not error to allow an attorney privately employed to conduct the case for the prosecution, after the district attorney had taken part in it in his official capacity.
4. In determining whether a charge to the jury contains prejudicial error, consideration should be directed to the charge as a whole and as the jury must have understood it, and not to isolated sentences and clauses.

ERROR to review a judgment of the municipal court for the Eastern district of Waukesha county: D. S. TULLAR, Judge. *Affirmed.*

Error to review a judgment rendered on a conviction of

the plaintiff in error, *King Bartell*, of the offense of assault and battery

Bartell claimed to be a magnetic healer, in the regular practice of his profession. He treated a young girl, about eighteen years of age, the person upon whom the offense was committed, at her request and with the sanction of her father. The girl was ignorant of what was necessary on her part in receiving the massage treatment, which was *Bartell's* method of operating. She was afflicted with some nervous trouble. *Bartell* went into a room alone with her, caused her to remove all of her clothing, and then, while her naked body was wholly exposed to his view, he gave her a massage treatment lasting some fifteen minutes. The evidence tended to show that after the treatment aforesaid *Bartell* caused the girl to sit on his lap and that he took some indecent liberties with her. The theory of the prosecution was that it was not necessary to the massage treatment that the girl should have exposed her person to *Bartell's* view, as she did under his direction; that she submitted to such direction solely because of her ignorance; that *Bartell* caused her to do so, not from the reasonable necessities of the case, but for his lewd personal gratification. The court submitted the case to the jury to find a verdict of guilty or not guilty, according as they should determine the question of whether *Bartell* fraudulently caused the girl needlessly to expose her person to his view for his lewd personal gratification, charging them that any touching of her body under such circumstances satisfied the requirements of the charge of the offense of assault and battery. The result was a verdict of guilty and judgment accordingly.

For the plaintiff in error the cause was submitted on the brief of *Armin & Waite.*

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

MARSHALL, J. Two doctors were allowed to testify as experts on the part of the state regarding whether it is reasonably necessary, in giving the massage treatment to a woman, to require her to expose her person to the view of the operator and whether it is customary where the operator is a man. The witnesses testified that they, as physicians, were familiar with the massage treatment, the methods employed in giving it, and the reasonable requirements on the part of the patient in order to receive such treatment. That sufficiently demonstrated that the witnesses possessed special knowledge of the subject upon which they were allowed to testify.

Evidence was excluded as to *Bartell's* having cured a person, by his method of treatment, afflicted with rheumatism. That is assigned as error upon the theory that *Bartell's* ability to beneficially treat a person afflicted with disease was material. The exclusion of the evidence was not harmful, because the court instructed the jury distinctly that whether *Bartell* possessed the power he supposed or pretended he possessed was not a subject for their consideration, that the only question for them to decide was whether, in the manner he proceeded to treat his patient on the occasion in question, he acted in good faith, or because of the manner he administered treatment to the patient he needlessly caused her to submit her body to him for the gratification of his evil desires. The question was, as in substance stated by the trial court, whether he so violated rules of propriety by needlessly causing his patient to submit herself to him, pretending, and causing her to believe, that such submission was a necessary incident of the treatment for curative purposes which she solicited at his hands, that his conduct assumed the character of a trespass upon her person.

Error is assigned because the court allowed an attorney privately employed to conduct the case for the prosecution, after the district attorney had taken part in the case in his

capacity as public prosecutor. The answer to that is that the law does not impose upon district attorneys the duty of prosecuting a person charged with the offense of assault and battery. They are expressly exempted from it by subd. 2, sec. 752, Stats. 1898. No requirement of the public prosecutor for Waukesha county to appear as such in criminal trials in the municipal court for the Eastern district of such county enlarges his statutory duty as to the kind of offenses that he must prosecute in his official capacity. The legislative policy is clear, as indicated in the section of the statute referred to, that in assault and battery cases there shall be no restraint upon the liberty of persons to privately employ counsel to prosecute.

Some criticism is made of the instructions given to the jury, but we are unable to discover any harmful error in them. The jury were told, in substance, and in language that could not reasonably have been misunderstood, that if *Bartell* treated his patient in good faith, for the purpose of curing the disease with which she was supposed to be afflicted, and in good faith caused her to expose her body to his view for the purposes of such treatment, his conduct did not constitute the offense of assault and battery; but if, on the other hand, he needlessly caused such patient to expose her person to his view for his evil purposes, and she submitted because of her ignorance, and under those circumstances and for such purpose he secured the opportunity of laying his hands upon her body, he was guilty of the offense of assault and battery. There was no error in the charge so understood, and none would be claimed by counsel for the plaintiff in error. The counsel discovered what he deemed to be harmful error by looking at isolated sentences and clauses in the instructions given to the jury, instead of examining the charge as a whole and as the jury must have understood it.

The law relating to physical violations of the persons of

females, accomplished by such a species of fraud or imposition as may be exercised by a person under the pretense of necessity or authority, where the violator, because of his position, has exceptional opportunities for thus imposing upon his victim, is too well known to need any discussion here. It is not liable to be too often or too rigorously enforced. It was properly administered in this case so far as we can discover from the record. The assignment of error that the verdict is contrary to the evidence is not well taken. There is ample evidence to sustain it and no reversible error in the record.

By the Court.— The judgment of the municipal court is affirmed.

THE STATE VS. SEILER.

March 3 — March 20, 1900.

Criminal law and practice: Fornication: Validity of statute: Discretion as to offense: "Man" defined: Evidence: Previous chaste character: Corroboration.

1. Sec. 4580, Stats. 1898, as amended by ch. 99, Laws of 1899 (providing, first, that if any man commits fornication with a sane female over the age of fourteen each shall be punished by imprisonment in the county jail, etc.; and, second, that if any man commits fornication with a sane female of previous chaste character under the age of eighteen years, he shall be punished by imprisonment in the state prison, etc.), is a valid enactment so far as it provides a punishment for the latter offense; and the fact that it leaves some discretion in the prosecuting officer in some cases whether to prosecute under one clause or the other does not affect its validity. *State v. Wentler*, 76 Wis. 89, distinguished.
2. The word "man," as used in said statutes, is not limited to male persons over twenty-one years of age, but includes male persons who have arrived at the age of puberty, or are capable of committing fornication.
3. An information contained two counts,— the first charging rape and the second fornication with a sane female of previous chaste char-

acter under eighteen years of age. The prosecutrix was between fifteen and sixteen years of age, and testified to an atrocious attack upon her. Her testimony that she was of previous chaste character was uncorroborated. The defendant admitted the intercourse, but claimed that it was with her consent. At the close of the testimony the district attorney withdrew the charge of rape, and the jury found the defendant guilty on the second count. *Held*, that, although this finding negatived the use of force and thus tended to discredit the testimony of the prosecutrix, yet her testimony as to previous chaste character was still in the case and might support the verdict.

4. In a prosecution for fornication with a sane female of previous chaste character under the age of eighteen years, corroboration of her testimony as to chastity is not required in order to sustain a conviction.

REPORTED from the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Questions answered in the affirmative.*

For the plaintiff there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

For the defendant there was a brief by *E. B. & R. E. Bundy*, and oral argument by *R. E. Bundy*.

BARDEEN, J. The information contains two counts. The first charges the defendant with the crime of rape; the second, with having committed fornication with a female of the age of fifteen years, of previous chaste character. Upon the trial the complaining witness testified that defendant assaulted her, choked her into insensibility, and then accomplished his purpose. The defendant admitted the sexual act, but swore that it was with her consent. The complaining witness was between fifteen and sixteen years of age, and the defendant between twenty and twenty-one. At the close of the testimony the district attorney withdrew the charge of rape. The court charged the jury that there was no evidence of the complainant's previous chaste

character, except her own. The verdict was, "Guilty as charged in the second count." At the request of defendant, the trial court has reported the case to this court, under sec. 4721, Stats. 1898, upon the following questions: "First. Is section 4580 of the Revised Statutes, as amended by chapter 99 of the Laws of 1899, a valid enactment so far as it provides a punishment for fornication with a sane female of previous chaste character under the age of eighteen years? Second. Can a male person not twenty-one years old be convicted, under said section as amended, of the charge of fornication with a sane female of previous chaste character under the age of eighteen years, as charged in said second count? Third. Is the unsupported testimony of the female with whom the offense is alleged to have been committed, given under the circumstances above set forth, sufficient to justify the finding of a jury that she was, at the time the offense is alleged to have been committed, of previous chaste character?"

1. The defendant argues that the statute in question is invalid, because the same act is declared by it to be both a felony and a misdemeanor, and it is within the discretion of the district attorney to say under which clause the offending party shall be prosecuted. The first clause of the law reads as follows: "Any man who commits fornication with a sane female, over the age of fourteen years, each of them shall be punished by imprisonment in the county jail, not more than six months, or by a fine not exceeding one hundred dollars." This clause was not changed by the amendment of 1899. The second clause was amended by changing the word "fourteen" to "eighteen," so that it now reads as follows: "Any man who commits fornication with a sane female of previous chaste character under the age of eighteen years, shall be punished by imprisonment in the state prison not more than four years, or by fine not exceeding five hundred dollars, or by both fine and imprisonment." The argu-

ment is that a man may commit the act with a female between the age of fourteen and eighteen years, and the district attorney, by using or omitting to use the words "of previous chaste character," may prosecute for a felony or a misdemeanor as he pleases, and hence the law is invalid, under the case of *State v. Wentler*, 76 Wis. 89. That case has a very remote application to the facts here presented. The law there under consideration was held invalid because of the uncertainty and confusion in which it would involve the administration of the criminal laws of the state, if held valid. No such result is here involved. The statute is plain and unambiguous. It leads to no such confusion or uncertainty as there suggested. The only possible objection is that it leaves some discretion in the prosecuting officer, in determining whether he shall, in certain cases, bring his prosecution under the one or the other of these clauses. It may be unwise to so frame laws that any such result will follow, but does that fact make the act an invalid law? In the administration of criminal laws the officer in charge of prosecutions is frequently called upon to decide which of two offenses he believes has been committed. The same act under one set of circumstances may call for one penalty, and under different circumstances for another. The intent very frequently increases the grade of the offense. In all such cases the officer charged with the duty of enforcing penal laws is called upon to determine the grade of the crime committed, and to institute the proper prosecution. No system of criminal jurisprudence can be devised that will relieve him entirely from the exercise of some discretion. There are many statutes which call for its exercise, but it is unnecessary to review them at length. According to legislative conception, it was a graver offense for a man to commit fornication with a female of previous chaste character than it was to commit the same act with one whose chastity was questionable. The severity of punishment rests entirely with the

trial court, after guilt has been established. When the previous chastity of the female is set forth and proven, the transgressing male must face the penalty prescribed, if the female is under eighteen. The fact that he *might* have been prosecuted under the first clause of the law is not sufficient reason for holding the whole statute, or any part of it, invalid.

2. The defendant's contention as regards the second question arises in regard to the use of the word "man" in the statute. The argument is that the word "man" means a male adult, as distinguished from a woman or a boy. Undoubtedly, this is the usual definition given by the lexicographers. The defendant carries the argument farther, however, and claims that the word "adult" means a man of full age. Hence the conclusion is that the use of the word "man," in the statute, must be limited to a male person over the age of twenty-one years, and the defendant, lacking a few months of that age, cannot be held liable for the offense charged. In determining the intention of the legislature in the use of this word, it is proper to ascertain the spirit of the act, and the mischief or vice aimed at. No one can doubt but that the object of the legislature was to prevent the illicit intercourse of the sexes, and the consequent evils. In law, the word "man" frequently has a broader and more comprehensive meaning than usually given in the dictionaries. Much depends upon the context and the object sought to be attained. In some of its uses, it is construed to mean "all human beings, or any human being, whether male or female." And. Law Dict. Another law writer says: "Man is a human being; a person of the male sex; a male of the human species above the age of puberty." Bouvier. "A human being of the male sex who has arrived at the age of puberty." Rapalje & Lawrence. In *Kenyon v. People*, 26 N. Y. 211, construing the statute in regard to seduction, which says, "any man who shall, under promise of marriage,

seduce," etc., Judge BALCOM says: "The prisoner's counsel insisted on the trial and in the supreme court, and has argued here, that the word 'man,' as used in the statute referred to, means a male person twenty-one years of age. This is too technical and limited a meaning to be applied to the word, in the connection wherein it is used. It has a broader and a more comprehensive signification. The apparent spirit of the act, and the mischief or vice aimed at by the legislature, clearly show that the word 'man,' as used in the statute, means a male person who has arrived at the age of puberty, or is capable of committing rape." The language is directly applicable to the statute in question, and we adopt the conclusion stated, as the only one the legislature could have had in view when it was enacted. There is quite as good reason for curbing the impetuosity of youth as for laying the ban upon men of maturer years.

3. The third interrogatory raises the question whether the uncorroborated testimony of the female as to her previous chaste character, under the circumstances stated, is sufficient to sustain a conviction. The girl was between fifteen and sixteen years of age. She had testified to an atrocious attack upon her. The defendant admitted the intercourse, and testified that it was with her consent. The district attorney for some reason withdrew the charge of rape, and submitted the question of fornication. Now, because the finding of guilt negatives the use of force and implies consent, it is argued that her whole story must have been false. It certainly tended to discredit her testimony; yet her evidence as to previous chaste character was still in the case, and was a matter for the consideration of the jury. The jury were not permitted to pass upon the truth of her statement as to the assault, except in an indirect way, and it by no means follows that her entire testimony should be discredited. At least, it is not so palpably false as would justify the court in saying that there was no testimony to sup-

port the verdict. There is no rule of law in this state that requires her testimony to be corroborated. See *Wilcox v. State*, 102 Wis. 650. The jury saw the witness, and were in possession of all the facts and circumstances of the case. Their conclusion should stand unless we can say, as a matter of law, that it should not. Under the circumstances disclosed we do not feel justified in arriving at that conclusion.

Each of the questions submitted is answered in the affirmative.

By the Court.— So ordered.

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HAMILTON, Assignee, Respondent, vs. MENOMINEE FALLS QUARRY COMPANY, imp., Appellant.

SAME, Respondent, vs. SMITH, Intervener, Appellant.

SAME, Respondent, vs. HERMAN, Intervener, Appellant.

December 20, 1899 — April 6, 1900.

Fraudulent conveyances: Corporations: Insolvency: Laches.

1. The capital stock of a corporation is not to be reckoned as a liability when determining its solvency as to creditors.
2. As against either existing or subsequent creditors a solvent corporation may dispose of property for an inadequate consideration or by voluntary conveyance, if there is no actual intent to defraud creditors and the corporation is not rendered insolvent by the transaction.
3. So far as the validity of a transfer of corporate property depends on the solvency of the company, it must be considered on the basis of then existing values of property, and not in the light of subsequent changes.
4. Insolvency, in such connection, does not mean an insufficiency of quick assets to pay all debts at once, nor the inability to meet commercial obligations as they fall due in the course of business, but that the property of the corporation, real and personal, estimated at a fair and reasonable valuation, is substantially less than its debts.

5. The evidence in this case is *held* to show, contrary to a finding of the trial court, that at the time of a conveyance by a corporation its assets largely exceeded its liabilities and that the transfer did not render it insolvent.

6. In March, 1890, a corporation conveyed a stone quarry to a new corporation having the same stockholders. In December, 1891, the grantor made an assignment for the benefit of creditors. In March, 1892, the grantee of the quarry conveyed it to defendant, also a new corporation but having in part different stockholders. On November 1, 1894, the assignee of the original grantor brought an action to set aside said conveyances on the ground that they were fraudulent and void as to creditors of his assignor, alleging that the assignor was insolvent when it conveyed the quarry and that the conveyance was without consideration. The books and papers of the assignor, showing all the facts relied upon by the plaintiff, had been in his possession since the assignment, but an examination of them by an expert was not begun until in December, 1892, and no report thereon was made until a year later. Defendant had been in possession of the quarry ever since the conveyance to it, and had spent large sums in improving it and establishing the business, without any suggestion from plaintiff, until the action was commenced, that the title was defective. *Held*, that, even if the delay in the examination of the books was necessary, yet the subsequent delay for nearly a year in bringing the action, while defendant went on investing its money and incurring liabilities, constituted such laches as would bar plaintiff from equitable relief.

APPEALS from orders and a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Orders affirmed; judgment reversed.*

This is an action in equity, brought by the plaintiff, as assignee under a voluntary assignment of the Hadfield Company, an insolvent corporation, against the Menominee Falls Stone Company and the *Menominee Falls Quarry Company*, both of which are corporations, to set aside the conveyance of a stone-quarry property, made by the Hadfield Company to the Menominee Falls Stone Company, as well as a second conveyance of the same property, made by the stone company to the quarry company; both of said conveyances being

alleged to be fraudulent and void as to the creditors of the Hadfield Company.

There were many facts which were undisputed in the case, and such essential facts are, in substance, as follows:

The Hadfield Company was incorporated December 1, 1886, at Waukesha, Wisconsin, by Joseph, Abraham, and George A. Hadfield, who were and remained its sole and equal stockholders and directors. It succeeded to the property and business formerly carried on by the Hadfields in partnership, and had a nominal capital of $200,000, which was paid by the transfer to it of all the partnership property of the Hadfields, then comprising a large and valuable stone quarry at Waukesha, together with the personal property and choses in action. Afterwards, and prior to March, 1890, the Hadfield Company acquired about 150 acres of land, upon which there was another valuable stone quarry, at Menominee Falls, which is the property in litigation here. In order to develop said property, the Hadfields organized a railroad corporation, with a nominal capital stock of $100,000, and built a private railroad, twelve miles long, from the quarry to a station called Granville, upon the St. Paul Railway, and spent more than $100,000 building said road, and mortgaged the property for that sum to pay the construction expenses.

In March, 1890, the Hadfields organized the stone-quarry corporation with an authorized capital stock of $100,000, of which they were and continued to be the sole stockholders and directors, and caused a conveyance of the Menominee Falls land and quarry to be made by the Hadfield Company to this new corporation. No consideration was paid to the Hadfield Company for this property, but the consideration named in the deed was $35,000, of which $14,500 consisted of mortgages on the property assumed by the stone company, and the remaining $20,500 was charged to the Hadfields individually on the books of the Hadfield Company, January

1, 1891, and stock in the new corporation to the amount of $20,500 was issued to the Hadfields.

The Menominee Falls quarry was opened, worked, and improved during the season of 1890, all of its output being billed to and marketed and proceeds received by the Hadfield Company, which also paid the operating expenses, and the books of the Hadfield Company showed a profit made by the stone company January 1, 1891, of $18,007.31, of which $5,000 was expended in buildings and improvements to the quarry and $13,007.31 was credited upon the books of the Hadfield Company to the Hadfields upon their indebtedness for the stock of the stone company. The Hadfield Company had a branch office in Milwaukee, and conducted a lime, stone, and coal business there at a loss until the season of 1890 and 1891, when it went more heavily into the coal business in Milwaukee, and lost large amounts of money therein, amounting to over $120,000 in one season, according to its books. It also conducted its large stone and lime business at Waukesha in the usual manner, in which business there appears always to have been profit.

On the 14th of December, 1891, the Hadfield Company, being then insolvent in a large amount, made a voluntary assignment for the benefit of its creditors to one Townsend, who resigned his trust March 16, 1892, and was succeeded by the plaintiff. The property in litigation was not included in the schedule of assets of the Hadfield Company made under sec. 1697, R. S. 1878, nor was any claim to said property made by the assignee prior to the commencement of this suit, November 1, 1894.

Early in the year 1892 negotiations commenced between Joseph and A. H. Hadfield upon the one side and *Henry Herman*, *Winfield Smith*, and Samuel Rosendale on the other, for the sale of one half of the property of the Menominee quarries and of the private railroad, which negotiations resulted, February 2, 1892, in a written agreement by which

Herman, *Smith*, and Rosendale agreed to buy one half of all the property or stock of the stone company and of the railway company for $50,000 (subject to the existing debts of $100,000 upon the railway and $9,500 upon the stone quarry). The Hadfields guaranteed that such property would make a clear profit of $15,000 a year. This agreement was afterwards modified so that a new corporation should be formed with an authorized capital stock of $100,000, of which the two Hadfields were to take one half, and *Herman*, *Smith*, and Rosendale were to take the other half, and all of the property of the stone company and the railroad company should be transferred to the new corporation. This new corporation was called the *Menominee Falls Quarry Company*, and is the appellant here, and it was incorporated March 5, 1892, pursuant to the agreement. *Herman*, *Smith*, and Rosendale paid $50,000 in cash into the treasury of the new corporation, and Joseph and A. H. Hadfield each gave a check for $25,000. All of the property of the stone company and the railway company was transferred to the quarry company, and the Hadfields took the money paid in, as well as their own checks, they being then the sole stockholders of the stone company and the railway company. The Hadfields became directors of the new corporation with *Herman*, *Smith*, and Rosendale, and the new corporation took possession of the Menominee Falls quarry and the railroad, and operated them from that time until November 1, 1894, when this action was commenced.

The court did not find that the Hadfield Company conveyed the Menominee Falls quarry to the stone company in March, 1890, with intent to defraud its creditors, either present or prospective, but did find that on the 26th of March, 1890, the liabilities of the Hadfield Company, including its liability upon stock to its stockholders, exceeded its available assets by over $250,000, and that it was then hopelessly insolvent; that said transfer to the stone company was in

fact a transfer of corporate property, without consideration, by directors to themselves, made while the company was insolvent, and hence was void as to creditors of the Hadfield Company; that certain of the present creditors were such on the 26th of March, 1890, and that present creditors to the amount of $127,000 are creditors whose property was sold by the Hadfield Company, and the proceeds used to pay debts of the Hadfield Company which existed March 26, 1890; that the quarry company was not an innocent purchaser for value of the property in litigation, for the reason that the Hadfields, who became directors of the quarry company, had actual knowledge of all the facts, and because *Herman*, *Smith*, and Rosendale had knowledge of such facts as should have put them upon inquiry, which inquiry, if made, would have resulted in their learning the actual facts; that both transfers were void as to the plaintiff and the creditors of the Hadfield Company, and that the plaintiff was entitled to an accounting with both the stone company and the quarry company for all profits received from the property and business.

After the filing of the trial judge's opinion, but before the formal findings were signed, both *Smith* and *Herman* made separate applications to be interpleaded as defendants in the action, for the purpose of protecting their individual rights, claiming to have made large advances to the quarry company, and that they were entitled to be protected as creditors of the quarry company in the judgment. These applications were denied, and an interlocutory judgment entered, holding the transfers void and ordering an accounting pursuant to the findings.

From this judgment the quarry company appeals; and *Smith* and *Herman* appeal separately from the orders denying their petitions for intervention.

For the appellant *Menominee Falls Quarry Company* there was a brief by *Samuel Rosendale* and *Chas. Quarles*, of coun-

sel, and also a brief by *Charles E. Monroe*, of counsel; for the other appellants there was a brief by *Mr. Quarles*; and the cause was argued orally by *Mr. Quarles* and *Mr. Rosendale.*

For the respondent there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, attorneys, and *Van Dyke & Van Dyke & Carter*, of counsel, and oral argument by *James G. Flanders* and *W. D. Van Dyke.*

The following opinion was filed February 2, 1900:

WINSLOW, J. As will be seen from the foregoing statement of facts, the trial court did not find actual fraudulent intent on the part of the Hadfields or the Hadfield Company to defraud either existing or prospective creditors of the company in conveying the Menominee quarries to the stone company, although such intent to defraud was charged in the complaint, but the court found in effect that the Hadfield Company was hopelessly insolvent in March, 1890, when the transfer was made; that the transfer was a transfer without consideration by directors of an insolvent corporation to themselves, and was hence void as matter of law as to the plaintiff and all creditors of the Hadfield Company; and that the quarry company took the property with notice, both actual and constructive, of the facts constituting the fraud; and hence that both of the conveyances attacked should be set aside. These are the facts, then, upon which the judgment is to be sustained, if sustained at all, namely: that the Hadfield Company was insolvent; that the directors conveyed corporate property to themselves without consideration; and that the quarry company took the property charged with knowledge of the facts.

As to the first and foundation fact, upon which the whole fabric depends, namely, the insolvency of the Hadfield Company when the deed was made, the finding is that the liabilities of the company, *including its capital stock*, exceeded

its available assets by over $250,000, and it was then hopelessly insolvent. The first noticeable element in the finding is that the stock liability is reckoned as a liability to be considered when determining solvency as to creditors. If this be a liability which must be considered in determining corporate solvency in the business world, then it is probable that there are very many insolvent corporations. Let any business man financially interested in corporations stop a moment, and figure up their liabilities one by one, reckoning in the liabilities to stockholders for stock issued, and then reckon up their readily convertible assets, and how many will he find that can be said to be solvent under this rule? Not many, we think. And again, what does "*available*" assets mean? The word available must have been inserted for some limiting or qualifying purpose. It must have been intended as including certain assets and excluding others, else there was no reason for its use. The ordinary meaning of "available" is "usable, capable of being used to advantage;" and we suppose when the word qualifies assets, as here, it must mean property that can be sold or turned into cash with which to pay debts within a reasonable time. So the inevitable inference from the finding is that, if a corporation has not enough assets which can be used within a reasonable time to pay its creditors and its stockholders in full, it is insolvent.

We find ourselves unable to subscribe to this idea. It is true that in the final winding up of the affairs of a corporation, after all creditors are paid (and not until then), the stockholders are entitled to come in and receive payment for their stock. But such rights do not interfere in the least with the claims of true corporate creditors; so that, as far as such creditors are concerned, the ability of the corporation to respond to its stockholders upon stock liability is of no moment. As to creditors the question simply is, Has the corporation ample property to pay them? not, Has it

property sufficient to pay off every stockholder after payment of its debts to creditors? It is also true that stockholders of a corporation may, by action, prevent the directors from wasting or squandering the capital or assets of the corporation, and may compel restitution of squandered property to the corporation, because the corporate property is the property of the stockholders (subject to the payment of debts), and the directors are their trustees in the management thereof, and have no right to squander or give it away when a stockholder objects. No such question arises here, however, because the transfer here attacked was made with the consent and approval of every stockholder, and they could not be heard to complain thereof, and in fact are not complaining. It is now settled in this state, as the result of a series of decisions, that the directors of a going corporation are in no sense trustees for the corporate creditors in the management of the corporate business, even though the corporation be insolvent; and that it is only when the corporation ceases to be a going concern, or the situation is such that its directors know, or ought to know, that suspension is impending, that its assets become a trust fund, so that directors may not prefer themselves over general creditors (*Hinz v. Van Dusen*, 95 Wis. 503); and, further, that when the corporation is solvent, and there is no actual intent to defraud creditors, it may dispose of property for an inadequate consideration or by voluntary conveyance as an individual may do, and subsequent creditors cannot question the transaction (*Shoemaker v. Washburn L. Co.* 97 Wis. 585; *Graham v. Railroad Co.* 102 U. S. 148). This last proposition is founded upon very plain principles of justice and reason. A simple creditor has no interest in or lien upon the corporate property. If, after a corporation has conveyed a part of its property with no fraudulent intent, but for an inadequate consideration, there still remains ample corporate property to pay debts, then no existing creditor

can complain, for he has not been damnified. And if this is true as to present existing creditors, it is necessarily and more clearly true as to subsequent creditors who have not relied upon the conveyed property for security or contracted with reference thereto.

The court below found upon sufficient evidence that a part of the present creditors of the Hadfield Company were creditors whose claims existed on the 26th day of March, 1890; hence the question as to the validity of the transfer made on that date must be considered with reference to the rights of creditors then existing. But it is important to observe that, so far as the validity of the transfer depends on the solvency of the company, it must be considered on the basis of the values of property as then fairly estimated and considered; that is, in the light of then existing values, and not in the light of the terrible drop in values which took place after the great financial depression of 1893.

It is entirely apparent from the testimony that the Hadfields considered themselves in excellent financial condition in March, 1890. They certainly owned much property and had a good business. The testimony shows that the business had been begun by them in a small way in 1871, with a small quarry and a small capital, and that it had been rapidly developed, new quarry lands being purchased, railroad switches being laid into the quarries, and the business extended, until soon after the year 1880 it had become a business of very large proportions, making profits of from $10,000 to $15,000 a year. In the year 1890 the Hadfield Company employed 100 men in their stone quarry and business. They operated a store at Waukesha, where many of the men bought their supplies, and made a profit estimated at $2,500 per year therefrom. They had laid out large additions to the village of Waukesha, and built houses thereon, many of which they rented, and they were receiving nearly $4,000 per year from such rentals. They had also accumu-

lated valuable real estate in Milwaukee, and in other parts of Wisconsin, as well as in Illinois, and they had acquired the Menominee Falls quarry property, in litigation here, which was potentially valuable, but was still largely undeveloped, but ready for immediate development by means of the private railroad which the Hadfields had then constructed by means of bonds covering the road. It is true they were largely indebted at this time and had suffered serious losses in the Milwaukee business, but these facts are not unusual in the conduct of such enterprises; in fact, it would be unusual if they were not heavy borrowers and had not suffered some losses. There is no evidence that we have been able to find in the record which tends to show that they had reason to contemplate, or did contemplate, anything like serious disaster in the future, or that they thought for a moment that it was necessary or advisable to secrete or transfer property to avoid payment of debts.

This being the situation, they organized a new corporation (the Menominee Falls Stone Company) for the operation of the Menominee quarries, and transferred those quarries to it for the expressed consideration of $35,000, and placed the deed immediately upon record. The Hadfields claim that the consideration named in the deed was the total amount which the property had cost them up to that time, but the court found that the property had then cost them about $80,000, and we accept the finding as conclusive. No money was paid to the Hadfield Company upon this purchase, but mortgages of $14,500 upon the property were assumed by the new company, and, upon the 1st of January following, the Hadfields personally were charged on the books of the Hadfield Company with $20,500, being the balance of such purchase price. Now, they had a perfect right to transfer this property to the new corporation upon credit and for an inadequate price, so far as the Hadfield Company and its stockholders were concerned, because all the stockholders of the

Hadfield Company concurred in the transfer and all consented to the transfer and received the benefit thereof. They had also a right, as against existing or future creditors, to make such a transfer, if made without fraudulent intent, and if, without such property, the Hadfield Company still retained enough property, at reasonable current values, to discharge its debts; and this is the crucial question of fact in the case, and requires an examination of the evidence upon the point.

Eliminating the stock liability, the court's finding was that the available property of the Hadfield Company on March 26, 1890 (excluding the Menominee quarry), was $50,000 less than its liabilities, and that it was thereby hopelessly insolvent. If this finding be correct, then existing creditors at least would probably have a right to complain of the conveyance; otherwise not. The finding was evidently based upon the investigations and conclusions of an expert accountant, who labored upon the books, vouchers, and papers and memoranda of the Hadfield Company in the hands of the assignee for more than a year consecutively, beginning in December, 1892, and at various times during succeeding years for considerable periods of time up to the time of the trial of this action, which began in February, 1897. As a result of this examination, the expert first testified that the assets of the company March 26, 1890, amounted to $265,883.22, and its liabilities, excluding stock liability, were $385,022.22, leaving a deficit of about $120,000. In the estimate of assets the entire real estate of the company (excluding the Menominee quarries) was placed at $109,231.16, which amount was arrived at simply by compiling the net cost to the company of its real estate as shown on its books. Subsequently, during the trial, after the introduction of evidence as to the values of the various parcels of real estate on both sides, the plaintiff voluntarily added to the real estate item the sum of $25,827.39, and to the personal prop-

erty items $354.62, making a total of admitted assets of $292,065.24; and also struck out liabilities amounting to $2,379.87, thus leaving an excess of liabilities over assets of about $90,000. On the other hand, the defendants claimed, basing such claim upon cross-examination of the expert and upon oral testimony of witnesses, that the amount of assets as originally fixed by the expert should be increased in the sum of $450,983.69, and that the liabilities should be decreased in the sum of $56,944.56, making totals as follows: Assets, $607,635.76, and liabilities $328,077.66, and a surplus of assets over liabilities of $279,558.10. It will be seen that the difference in the respective claims is very great. The trial court found the excess of liabilities over "available" assets to be $50,000, but the findings do not show whether this reduction of the amount of deficit claimed by the expert was based upon too low an estimate by him of assets or upon too great an estimate of liabilities. In any event, it is plain that the court did not accept as entirely correct the figures of the expert.

The largest single item among the items of increase of assets claimed by the defendants is in the valuation of the Waukesha stone quarries, which the defendants claim should be placed at $225,000, instead of at $65,500, as listed by the plaintiff in its corrected figures. If the defendants' contention on this item is correct, or substantially correct, or if the quarries were worth any sum exceeding $155,000, then, even conceding the liabilities (excluding stock liability) to be as great as plaintiff claims, there was no deficiency of assets when the conveyance attacked was made. But here arises the difficulty as to the meaning of the term "available" assets. If by that term is meant assets which can be readily turned into money—such as open accounts, notes, bills, mortgages, and choses in action, as defined in *Brigham v. Tillinghast*, 13 N. Y. 216,—then the finding is entirely inadequate as a finding of insolvency, in the sense in which

the word "insolvency" is here used. If "available" assets include real estate at a price it would bring at an immediate and forced sale, the finding is equally inadequate for the plaintiff's purposes. Insolvency, as the word is here used, does not mean an insufficiency of quick assets to pay all debts at once, nor the inability to meet commercial obligations as they fall due in the course of business, but it means that the property of the debtor, real and personal, estimated at a fair and reasonable valuation, is substantially less than his debts.

As to this fact the court has not found, nor do we think that it could find under the evidence, that such a condition of affairs existed in March, 1890. The testimony is very voluminous, and the various items very numerous, and we cannot undertake to review them in detail here; but concerning the one item of the value of the Waukesha quarries the testimony may be briefly considered.

The great differences of opinion which always exist among witnesses as to the values of real estate are well understood by the profession. Perhaps no question of fact is more difficult of accurate solution. Particularly must this be the case when considering a large manufacturing or mining plant, the value of which depends so largely upon the condition of the concern which is operating it, whether the business is well established and has a flourishing trade, or whether it is new in the field and has yet to acquire its hold in the business world; in other words, upon the condition of the good will. Many other circumstances enter into the question of the reasonable value of such property which will readily suggest themselves to the mind.

In the present case there was a large tract of real estate, amounting to more than 160 acres, containing a large and well-developed quarry of excellent building stone, owned by parties who had developed a large and exceedingly profitable business and were still operating it with apparent suc-

cess. It was within easy reach of great building centers, such as Chicago and Milwaukee, fully equipped with all necessary machinery for its operation, with railway switch tracks running into it. It also produced excellent lime, and was fully equipped with twelve or fourteen kilns for the production of lime, and had an excellent business established in this commodity; and it is not claimed that the quarry was approaching exhaustion either in building stone or lime stone. Bearing these facts in mind, we come to the expert evidence, and find that the plaintiff called four witnesses upon the question of value, two of whom placed the value at from $50,000 to $60,000, one at $60,000 to $70,000, and one at $75,000. The plaintiff himself testified that he thought it worth $75,000 to $80,000; that in the fall of 1892 he received an offer of $92,000, but that the terms were not arranged, and that he made strenuous efforts to sell it, fixing the price in some instances at $100,000, but had not succeeded in selling. It is not strange that during the universal depression in business which prevailed from the spring of 1893 up to the time of the trial of this action the assignee has not succeeded in selling such a large property. On the other hand, the defendants produced four witnesses whose means of knowledge seem fully equal to those possessed by plaintiff's witnesses, one of whom placed the value at $200,000 and the others at $225,000. The first of these witnesses was a man engaged in the lime and stone-quarrying business, who, after examination, made the Hadfields an offer of $200,000 in the spring of 1890 for the property, which was rejected by them as insufficient. In addition to this testimony, A. H. Hadfield testified that in his opinion the property was then worth $250,000, and *Mr. Hermann* (the intervener, appellant here) testifies that in or about the year 1889 he made a proposition to Mr. A. H. Hadfield on behalf of other parties to purchase the property for $225,000.

As we do not know at what figure the court placed the

value of this property, or in fact whether it was considered an available asset at all, except by inference, we are at liberty to consider the question upon the weight of the evidence upon the subject, and we are entirely satisfied that it would not and does not sustain the conclusion that its reasonable value in March, 1890, was but $65,500; nor do we think any fair or just consideration of that evidence would allow the fixing of its value, in consideration of its demonstrated earning capacity, at anything less than $150,000. We cannot undertake to review all the evidence upon the subject, nor state in detail all the considerations which force our minds to this conclusion, but it must be sufficient to say that, after careful review of the testimony, we can reach no other result. This result adds at least $85,000 to the sum of the Hadfield Company's assets in March, 1890, and practically wipes out the deficiency of assets claimed by the plaintiff's expert.

There are other items of assets which the evidence clearly demonstrates ought to be increased in amount above the expert's statement, as well as items of indebtedness which ought to be stricken therefrom, but it would extend this opinion to an unwarrantable length were we to attempt to review them in detail. Suffice it to say that, in our judgment, the reasonable value of all the assets at the time of the transfer attacked is shown clearly by the evidence to have exceeded the liabilities, not by a mere beggarly margin, but in an amount running up well into the thousands, and that the transfer did not render the company insolvent in the sense in which that word must here be used.

There being no actual fraudulent intent, and the company being solvent, and not rendered insolvent by the transfer, there is no ground upon which the transfer can be set aside as to existing creditors, and for stronger reasons it cannot be set aside as to subsequent creditors. The subsequent heavy losses and consequent hopeless insolvency of the com-

pany, whether resulting from imprudent management or reckless business adventures, cannot affect the question. These are chances which every man who extends credit to another or to a corporation must always take, and must submit to the result as philosophically as he may.

This conclusion effectually disposes of the plaintiff's claim, but there is another consideration which reaches the same result and which we shall briefly state. The sale of the Menominee quarry to the present defendant was made in March, 1892, and *Herman*, *Smith*, and Rosendale then invested $50,000 in the purchase. No claim was then made by any one that there was any defect in the title. The defendant corporation immediately went into possession and active operation of the quarry, and continued to operate it without let or hindrance, or even claim by the plaintiff that the title would be attacked, until the commencement of this action, November 1, 1894,—a period of nearly three years. During this time the evidence shows that nearly or quite $40,000 has been spent in improving the property and establishing the business. During this time, also, all the books and papers and other means of information upon which the plaintiff now relies were in his possession, or in the possession of his predecessor. It will not do to say that the facts could not be discovered earlier. The expert testifies that he began his examination in December, 1892. This was surely a long delay, when we consider that the plaintiff claims that *Herman*, *Smith*, and Rosendale should have known of the fraud in March, 1892, when they purchased. But waiving this point, we find that the expert spent a year making his first examination, and made his first report in December, 1893. This seems to have been a very long time, when the facts all appeared upon the books and papers; but, conceding this delay to have been necessary, still the action was delayed for another year, and in the meantime the defendant was allowed to go on investing its money and

incurring liabilities without suggestion of a fatal defect in its title. We cannot but regard this delay as constituting laches which, within well-known rules, will bar the plaintiff from now invoking the aid of a court of equity. *Rogers v. Van Nortwick*, 87 Wis. 414.

The conclusions reached in the main case render unnecessary any consideration of the appeal from the orders refusing to *Smith* and *Herman* the right of intervention.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendant. The orders appealed from are affirmed.

The respondent moved for a rehearing in the case of *Hamilton v. Menominee Falls Quarry Company.*

For the motion there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, attorneys, and *Van Dyke & Van Dyke & Carter*, of counsel, and a separate brief signed by *Van Dyke & Van Dyke & Carter*, of counsel.

In opposition there were separate briefs by *Quarles, Spence & Quarles*, of counsel, and *Sam'l Rosendale*, attorney.

The motion was denied April 6, 1900.

KOLLER, Appellant, vs. CITY OF LA CROSSE, Respondent.

February 28—April 6, 1900.

Municipal corporations; La Crosse city charter: Taking of land for street: Offset of benefits against damages: Award valid or invalid as a whole: Counterclaim: Personal liability of lotowner.

1. Under sec. 6, subch. VI, of the La Crosse city charter (ch. 162, Laws of 1887, as amended by ch. 492, Laws of 1889), relating to the determination, by commissioners, of the compensation to be made for land proposed to be taken for street purposes and of the damages and benefits arising from the proposed improvement, the compen-

sation and damages on the one side and the benefits on the other are to be offset, and only the difference between them is to be paid by or to the owner.

2. The award of the commissioners in such proceedings is either valid or invalid as a whole, and cannot be made the basis of a recovery of the value of the land taken, independent of the benefits assessed or attempted to be assessed to the remaining part of the same lot or parcel. So *held* in a case where the commissioners had failed to strike the balance, as required by the charter, between the value of the land taken and the benefits, and the land not taken had been sold at a tax sale for the full amount of the benefits attempted to be assessed against it.

3. In an action in such a case to recover the value of the land taken as determined by the commissioners the city cannot counterclaim the amount of the benefits assessed.

[4. Whether the excess of benefits over the value of the land taken can be made a personal liability against the lotowner, not determined.]

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The plaintiff was the owner of a tract of land in the city of *La Crosse.* In 1896 the city undertook to lay out Denton street, and found it necessary to take a portion of said tract. Appropriate proceedings were instituted to that end, and commissioners were duly appointed as required by sec. 6, subch. VI, ch. 162, Laws of 1887, as amended by sec. 6, ch. 492, Laws of 1889, to view the premises and determine the compensation to be paid to the owner for the land taken, and also what lands would be benefited, and to assess the amount of damage and benefits to each of the parcels affected by such improvements. The commissioners made an award, in which they determined the value of plaintiff's land taken to be $450. They also reported as follows: "In the opening of said Denton street, the commissioners do assess benefits to each of the following tracts of land or lots and to the owners thereof, to wit." Then follows the name of plaintiff, and a description of land, which, by mistake, failed to cover any land owned by plaintiff, and against which they

assessed benefits of $850. This report was confirmed by the council, and under another provision of the charter was referred to the board of public works and tax commissioner as a board of assessment and apportionment, who assessed and apportioned the expenses of the proceeding against the lands affected thereby. They duly made report to the council, which was confirmed. Thereupon they made the assessment roll as required by the charter, and the benefits and expenses so assessed went into the tax roll of the city for 1897 as special taxes against the erroneous description above referred to, amounting in all to $925.72. On December 17, 1897, and after the report of the commissioners had been filed and confirmed, the council made an appropriation, as required by the charter, for the purpose of paying the damages and balances of damages and benefits as shown by the award of the commissioners, and certified the same to the city treasurer. Due publication of the fact was made by the treasurer, and plaintiff furnished the required abstract, and made application to the treasurer for the said sum of $450, the value of the land taken, but the treasurer refused to pay the same. The city entered upon and occupied the land for street purposes, and has never paid for the same. Plaintiff made due application to the city for such payment, but payment was refused, and thereafter this action was brought to recover said amount.

The city answered, admitting the proceedings to condemn the land for a street, and alleged that the commissioners made an award of benefits $850, and of damages $450, and that the benefits exceeded the damages by $400. It was also alleged that the charter provided that only in case where the damages exceeded the benefits was the city required to make any payment. As a counterclaim and offset it was alleged that the plaintiff was indebted to the city in the sum of $850 for benefits assessed against his premises for the opening of said Denton street.

On the trial it was admitted that the commissioners made a mistake in the description of the land against which they assessed benefits as shown by their award. It was shown, however, that on November 18, 1898, the council adopted a resolution, reciting the award of the commissioners, the mistake in the description mentioned, which they undertook to correct, and directing the clerk to enter the corrected description in the tax roll. This was accordingly done, and the corrected description was entered in the tax roll for 1898 for the full amount of the benefits assessed against plaintiff, to wit, $925.72. The assessment not having been paid, the lands were duly sold, and a tax certificate issued, and is now outstanding. It also appeared on the trial that plaintiff had sold the land included in the corrected description prior to the commencement of this action. Both parties moved for a direction of a verdict, and the court directed a verdict for defendant. A motion for a new trial was denied, and judgment was entered for the defendant, from which the plaintiff has taken this appeal.

For the appellant there was a brief by *McConnell & Schweizer*, and oral argument by *C. H. Schweizer*.

W. F. Wolfe, city attorney, and *Martin Bergh*, of counsel, for the respondent.

BARDEEN, J. There is but one way the city of *La Crosse* can exercise the right of eminent domain, and that is by a substantial compliance with charter requirements. If this has been done, the end of the law has been fulfilled and the plaintiff has no standing in court. If these requirements have not been met, then the plaintiff's land has not been properly taken, and he can reclaim it. The complaint is based upon the theory that the proceedings taken by the city leading up to the making of the award of the value of the property taken were valid and regular, and it is for the amount of this award that judgment is demanded.

Subch. VI of the charter as amended by ch. 492, Laws of 1889, lays out the plan to be followed by the city when it is desired to take land for street purposes. It provides for the selection of, and determination of the necessity of the taking by, a jury. Sec. 6 of said ch. 492 provides that, after the verdict of the jury shall have been rendered, the council shall appoint commissioners "to view said premises and ascertain and determine the compensation to be paid the owners or persons interested in the real estate to be taken and appropriated, and also what lands, whether lying in said body or bodies necessary to be taken or not lying therein, will be benefited by such taking, and to assess the amount of the damage and benefits to each of the parcels of land affected by such improvement, whether lying in said body or bodies of land or not." It then provides for the meeting of the commissioners, and says: "At the time and place specified in such notice the commissioners shall view the premises described in the petition and proposed to be taken, and also all premises which will, in their judgment, be injured or benefited thereby. . . . They shall proceed thereupon to make their assessment and to determine and appraise the value of the several parcels of real estate proposed to be taken, and the damage, and also the benefit arising to each parcel of land, in their opinion damaged or bene fited by such proposed improvement," and make an award and report to the council. It also further provides that: "In making the said award and report, said commissioners shall assess and appraise to each lot or parcel of land, and to the owners thereof respectively, the injury arising or benefits accruing to the same from the proposed taking thereof. If any lands are both injured and benefited, they shall make allowance and deduction therefrom for any benefits which said lots and the owners thereof may respectively derive from such improvements, and if the damage to any lot or parcel of land shall be greater than the benefits received, or

the benefits be greater than the damages, in either case the commissioners shall strike a balance and carry the difference forward to another column, so that their report will show what amount is to be received or paid by such owner or owners respectively, or by such lots or parcels of land respectively, and the difference only in such cases between such benefits and damages shall be paid to or by them."

The complaint fails to note the further proceedings attempted to be taken in regard to the assessment of benefits and damages mentioned. The proof shows that, after determining the compensation to be paid the owner for the land to be taken, the commissioners made an attempt to assess benefits to the remaining portion of plaintiff's property. By mistake they failed to properly describe it, and this mistake was not discovered until nearly a year thereafter, when the council attempted to correct it.

We have had some little difficulty in arriving at the true intent and meaning of this charter provision. The confusion arises from the failure to make it entirely clear whether compensation for the land taken and the damages for such taking may be offset against the benefits to adjoining property held by the same owner. Very similar provisions are contained in the charter of the city of Milwaukee; and this court, in construing them in the case of *Holton v. Milwaukee*, 31 Wis. 27, said: "In determining the compensation to be made for the land (for it cannot be taken without compensation), the jury are first to ascertain and fix its value, and allow the same, and then to estimate or assess the benefits or damages, if any, to the remaining land or property of the plaintiff, which will result from the improvement when made. . . . If the jury find benefits thus received, they are to be deducted from the value of the land taken, and a balance struck; but if, on the contrary, they find damages, these are to be added to the value. If the jury find benefits in excess of the value of the land taken, the owner becomes

debtor to the public for such excess, and must pay the same. . . . As lands cannot be so taken and appropriated without compensation made to the owners, the assessments for benefits received are no more than a mode or species of taxation to provide or secure funds with which to make such compensation. The principle of such taxation is that the owner whose property is specially or peculiarly benefited by the laying out or opening of streets or highways should contribute the expense, or be taxed to make the requisite compensation; and as the party whose land is taken is equally within reach and operation of the principle with other owners, it may frequently happen that he may be without any direct pecuniary compensation at all, and sometimes he may even be required to contribute money beyond the value of the land taken. The appraisement of value and assessment of damages and benefits is doing that by one process or proceeding which otherwise might have constituted two,— first, an appraisement of value and estimate of damages to the owner whose land is taken, and then an assessment of benefits as a means of paying the value and damages; which latter would be a mere tax, and, of course, might fall on the owner whose land was taken in an amount equal to or in excess of the value and damages to which he might be entitled."

This case, it will be observed, sanctions the rule that compensation and damages may be offset by benefits, so that, if the scheme of the defendant's charter was framed to that end, it must govern our conclusion. We have made a careful reading of the different charter provisions, and cannot escape the conclusion that it was intended that compensation and damages should be construed as one, against which resulting benefits may stand as an offset, the difference either way to be paid or collected by the city. These are parts of an entire scheme which must be substantially followed or the taking must fail. The charter says that a balance between benefits and damages shall be

struck, and only the difference shall be paid by or to the parties. The commissioners failed to strike such balance, and the city, by its subsequent manipulation, failed to note or observe the requirement, but carried the full amount of benefits into the tax roll, without deducting the amount found due the plaintiff. This was certainly irregular and unwarranted, and if the outstanding certificate should be found to be valid,—a fact which we do not determine,—the plaintiff or holder of the land would clearly be entitled to a deduction therefrom the same as if the commissioners had struck the balance as required by the charter. If the award of the commissioners and the action of the council in attempting to correct the mistake in the description of the land benefited was valid and proper, then certainly plaintiff has no cause of action to enforce. If such proceeding were invalid, then the land was not taken according to law, and he must be left to his remedy to reclaim the land. The award, if valid, is valid as a whole. It cannot be divided in parts, and made available to plaintiff, for the purpose of a recovery of the value of the land taken, and repudiated as to the assessment of benefits. The duty to make the latter is just as imperative as to make the former. They are concomitant parts of one proceeding, and essential to a proper protection of the rights of all concerned.

The attempt to set up the award of benefits as a counterclaim does not seem to have been seriously regarded by the trial court. It was in no sense proper, and was rightfully disregarded. The power to make the balance of benefits a personal liability against the lotowner under defendant's charter may well be doubted. We leave the question undecided, as not being necessarily involved in the decision of this case. Authorities bearing on this question may be found collated in a note to *Ivanhoe v. Enterprise* (29 Oreg. 245), in 35 L. R. A. 58.

By the Court.—The judgment of the circuit court is affirmed.

BERGERON, Respondent, vs. PEYTON, imp., Appellant. 106 116 377 357

March 20 — April 6, 1900.

False imprisonment: Conversion of money paid by mistake: Evidence: Instructions to jury: Damages: Practice: Returning sealed verdict.

1. One who receives from a bank, upon a check, more money than he is entitled to, and with knowledge of the facts refuses to pay it back upon demand, is guilty of larceny.
2. Arrest and detention of the person who received such overpayment, not for the purpose of taking him before a magistrate, but solely to compel and induce him to repay, was not justifiable, and constituted false imprisonment.
3. In an action for such false imprisonment it was error to permit the plaintiff to testify that he was a married man and had a family.
4. It was also error to permit the plaintiff to prove that subsequent to his arrest one of the defendants commenced a civil action against him and garnished the chief of police, who was supposed to have the money, even though the court charged the jury not to allow damages by way of punishment.
5. An instruction to the jury that they should take into consideration the question of injury to plaintiff's reputation, and assess such sum as damages as would fairly compensate him for "the injury, if any, to his reputation," *held* error, especially as the court had limited the recovery to compensatory damages, and no special damages were alleged as to any such injury.
6. An instruction that the jury should not return a verdict for a mere nominal amount; that if the plaintiff had been falsely imprisoned he was entitled to substantial damages; and that they were the judges of how much such damages should be, also *held* error.
7. A direction to the jury that if they agreed before the next morning at 9 o'clock they should seal their verdict and hand it to the officer in charge, but not to report to the court until the day after, thus skipping a day when the court was in session, is criticised. Whether it was an abuse of discretion in this case, not determined.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

For the appellant there was a brief by *Ross, Dwyer & Hanitch* and *George B. Hudnall*, and oral argument by *Mr. Hudnall.*

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *W. R. Foley.*

CASSODAY, C. J. This action was commenced May 23, 1898, against the defendant *Peyton* and one F. E. Grant to recover damages for false imprisonment, May 19, 1898. The defendant *Peyton* answered by way of admissions, denials, and counter allegations. At the close of the trial of the issues thus formed, the jury returned a special verdict to the effect: (1) That the plaintiff was imprisoned by both defendants, acting jointly, May 19, 1898; (2) that such imprisonment was by both defendants; (3) that such imprisonment began after the defendant *Peyton's* first demand for his money had been refused by the plaintiff at the bank; (5) that before the plaintiff was so imprisoned he had not formed the purpose of appropriating the overpayment to his own use; (6) that at the time the money was paid to the plaintiff at the bank he did not know he was getting the sixty-odd dollars; (7) that the defendants jointly engaged in the imprisonment of the plaintiff at the commencement of such imprisonment; (8) that, assuming that the plaintiff's imprisonment began shortly after he returned to the bank with the defendant Grant, they assessed his damages at $100; (10) that the purpose of the defendants in imprisoning the plaintiff was solely to compel or induce him to repay the $43 overpaid. From the judgment entered upon such verdict for $100 damages and $64 costs the defendant *Peyton* brings this appeal.

The circumstances under which the alleged arrest was made are to the effect that on the day named the plaintiff, having received from one Magloire Beaudoin a time check, payable about a month afterwards, for work performed by him, which check stated that the plaintiff's work came to $67.30, "less Camp acct. $5.20," and "less cash, $40.00," leaving the "balance due $22.10," presented the same to the appellant, *Peyton*, at his bank, known as the Superior Bank, in West Superior, to be discounted at five per cent., as had been customary; that *Peyton*, by some inadvertence failing to observe the payments made on the account and deducted

in the check and that the check only called for $22.10, cashed the same on the supposition that it called for $67.30, thus paying to the plaintiff about $64 instead of about $21; that the plaintiff did not then know, as the jury found, that he had received about $43 more than he was entitled to, but did discover the fact at a saloon named, four or five blocks from the bank, about half an hour after he left the bank; that, soon after, the plaintiff met the defendant Grant, who was looking for him, and who took him to the bank; that *Peyton* then demanded the repayment of the $43, which the plaintiff, who had been drinking, repeatedly refused to repay, and stated that he would keep the money; that the plaintiff was then taken by the defendant Grant, who was a police officer, to the magistrate, and subsequently he was taken to jail.

Error is assigned because the court refused to grant a nonsuit or direct a verdict in favor of the defendants. There is no claim that the defendant Grant received any process against the plaintiff, or that any process was issued against him, prior to the time when he and Grant went to the office of the municipal judge, after they had been together at the bank. The plaintiff testified to facts from which the jury were at liberty to find, as they did, that he was imprisoned at the bank. If he was so imprisoned, then such imprisonment was without process. If he was imprisoned without process, and such imprisonment was unjustifiable, then it was false imprisonment. *Murphy v. Martin*, 58 Wis. 276; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321; *King v. Johnston*, 81 Wis. 578. The question recurs whether such imprisonment without process was justifiable. Manifestly, it devolved upon the defendants, if they could, to prove facts justifying such imprisonment. *Allen v. Wright*, 8 Car. & P. 522; *Michell v. State*, 12 Ark. 50; *S. C.* 54 Am. Dec. 253. It is a very singular fact — if it be a fact — that the plaintiff did not know at the time that he received from the

bank $43 more than he was entitled to. But he testified that he did not, and the jury evidently believed him. He admits, however, that he knew it before he was at the bank the second time; and that, with knowledge of that fact, he refused to pay back the money when demanded. Such refusal to pay back the money was a conversion of the money. It is true that the plaintiff received the money with the consent of *Peyton*. But the consent was only given by reason of a mistake on his part, which the plaintiff had discovered and admitted before he refused to pay back the money. Was such conversion of the money a crime? This court held many years ago that a conversion by a servant to his own use of property of the master put in his charge was larceny, and that the felonious intention to so convert need not have existed in the servant's mind at the time of receiving the property into his charge. *State v. Schingen*, 20 Wis. 74. Our statute declares, in effect, that a bailee of money or property who shall "fraudulently convert the same to his own use . . . shall be guilty of larceny." Sec. 4415, Stats. 1898. The same section provides that, if the property so converted shall exceed the value of $20, such bailee may be punished by imprisonment in the state prison; and another section of the statutes makes such an offense a felony. Sec. 4637. It has been held in New York that "one who receives from another money to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to cheat and defraud the owner thereof, is guilty of larceny." *Wolfstein v. People*, 6 Hun, 121. To the same effect, *People v. Call*, 1 Denio, 120; *Hildebrand v. People*, 56 N. Y. 394; *Phelps v. People*, 72 N. Y. 334, 362; *Welsh v. People*, 17 Ill. 339; *Murphy v. People*, 104 Ill. 528; *People v. Martin*, 116 Mich. 446.

The more important question is whether the circumstances were such as to justify the imprisonment without process.

As held in *Allen v. Wright, supra*, it was not only incumbent on the defendants to show that the crime had been committed, "but that the circumstances of the case were such that they, or any reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it." 8 Car. & P. 522. To the same effect, *Cahill v. Fitzgibbon*, 16 L. R. Ir. 371. It has been held in New Jersey that "a private person is justified in making an arrest where a felony has actually been committed and there is probable ground to suspect the arrested person of guilt." *Reuck v. McGregor*, 32 N. J. Law, 70. When a felony has been committed, an officer or a private individual may justify the arrest of a suspected person without a warrant, for the purpose of bringing him before an examining magistrate, if done upon proof of probable cause. *Brockway v. Crawford*, 3 Jones Law, 433. To that extent that case may be sanctioned. Under these authorities, and the facts stated, it would seem that the defendants would have been justified in arresting the plaintiff, without warrant, *for the purpose* of bringing him before the municipal court to be dealt with according to law. The difficulty in holding that the trial court should have directed a verdict for the defendants is that there is evidence tending to prove, and the jury found, that the defendants did not arrest the plaintiff for the purpose of taking him before the magistrate, but for the sole purpose of compelling and inducing him to repay to the defendant *Peyton* the $43 thus overpaid to the plaintiff. The imprisonment of the plaintiff for such a purpose was false imprisonment. In such a case "probable cause is only material in mitigation of damages." 3 Suth. Dam. (2d ed.), § 1257. The proof of malice is only permissible where punitory damages are allowable. It follows from what has been said that the trial court properly refused to direct a verdict in favor of the defendants. In other words, there is evi-

dence tending to prove that the defendants were technically guilty of false imprisonment.

Error is assigned because the court permitted the plaintiff to testify that he was a married man and had a family. Such evidence was well calculated to improperly increase the damages, and was in direct conflict with the decisions of this court. *Kreuziger v. C. & N. W. R. Co.* 73 Wis. 158; *Gores v. Graff*, 77 Wis. 181.

So we think it was error to permit the plaintiff to prove that, subsequent to the plaintiff's arrest, *Peyton* commenced a civil action against him and garnished the chief of police, who was supposed to have the money. It was certainly not the best evidence. Moreover, it tended to establish an improper measure of damages. It is true, the court charged the jury not to allow any damages by way of punishment; but the objectionable testimony was not withdrawn from the jury. *Bradley v. Cramer*, 66 Wis. 304; *Beggs v. C., W. & M. R. Co.* 75 Wis. 444; *Waterman v. C. & A. R. Co.* 82 Wis. 631, 632.

So we think it was error for the court to charge the jury that they should take into consideration the question of injury to the plaintiff's reputation, and assess such sum as would fairly compensate him for "the injury, if any, to his reputation." This is especially true where, as here, the trial court has limited the recovery to compensatory damages, and no special damages are alleged as to any such injury. 3 Suth. Dam. (2d ed.), §§ 1257, 1258.

So we think it was error for the court to charge the jury to the effect that they must not return a verdict for a mere "nominal amount,— that is, six cents, or one cent, or one dollar,— by which verdict," they "would say there had been technically a wrong done;" that if the plaintiff had been falsely imprisoned he was "entitled to substantial damages," if any; and that they were "the judges of how much that substantial damages should be." *Candrian v. Miller*, 98

Wis. 167, 168; *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 483. Thus, in an action for false imprisonment, in New York, it was held error to set aside a verdict for six cents damages. *Henderson v. McReynolds*, 38 N. Y. St. Rep. 734. So, in England, it has been held that the court properly refused a new trial where, in an action for false imprisonment, "the jury had given only one farthing damages . . . for taking the plaintiff before a magistrate upon an unfounded charge of felony, merely because a question of character was involved." *Apps v. Day*, 26 Eng. Law & Eq. 335.

Error is assigned because the court directed the jury to the effect that, if they agreed before the next morning at 9 o'clock, they should seal their verdict and hand it to the officer in charge, but not to report to the court until the day after at 9 o'clock, thus skipping a day when court was in session. The jury agreed on the evening of January 24, 1899, but, in pursuance of such instruction, did not report until the morning of January 26th. The practice of thus allowing the jury to seal their verdict and part with the same, and then separate for one or two days, is certainly not to be commended. But the trial court has a broad discretion in such matters, and we do not feel called upon to determine whether it did or did not abuse such discretion in the case at bar.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

FIELDS, Appellant, vs. THE ESTATE OF MUNDY, Respondent.

March 20 — April 6, 1900.

Foreign judgments: Faith and credit: Limitations: Claims against decedents.

1. The full faith and credit clause of the federal constitution, as regards the effect of judicial proceedings of one state in the courts of another, does not militate against the effect of a statute of limitations

of this state, as regards the remedy to enforce claims, whether based on judgments in the courts of another state or not.

2. A judgment allowing a claim against a deceased person in proceedings to settle his estate in a court of Minnesota, is affected the same as any other claim against the estate of such person in process of administration in a county court of this state, by sec. 3844, Stats. 1898, barring all claims against the estate if not filed within the time limited therefor under sec. 3840.

3. Sec. 3840, Stats. 1898, providing for a time limit to be fixed by the court for the filing of claims against the estate of a deceased person, and notice thereof to be given to all persons interested, if complied with by the fixing of such time and the giving of such notice, furnishes the exclusive remedy for the collection of such claims; and if they be not filed within the time so limited they will be barred by sec. 3844. Such sections admit of no exception on account of nonresidence of a claimant or the fact that his claim may have been allowed against the estate of the same person in a foreign jurisdiction.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The last will and testament of Edwin V. Mundy was duly admitted to probate in the county court of Douglas county, Wisconsin, June 23, 1891, and in the probate court of St. Louis county, Minnesota, October 22, 1891. Thomas A. E. Weadock, the executor named in the will, was confirmed as such and letters testamentary issued to him by each of said courts. Such proceedings were duly had in the settlement of the estate in the Minnesota court that a claim was there duly allowed May 23, 1892, in favor of *Myron W. Fields*, the appellant, a resident of such state, for $1,790. All the assets within the jurisdiction of such court were exhausted without realizing anything to pay appellant's claim. Such proceedings were duly had in the Douglas county court that the time for filing claims against the estate there was fixed by an order of such court and due notice thereof given, according to the laws of this state, to all persons interested. After the time thus limited *Mr. Fields* filed his claim against

the estate in such court, basing the same on the allowance thereof in the Minnesota court. On the hearing on such claim it was rejected upon the ground that it was barred by the statute of limitations. Sec. 3844, Stats. 1898. The claimant appealed to the circuit court and on the trial there produced and introduced in evidence the proceedings of the Minnesota court allowing the claim. The circuit court affirmed the order of the Douglas county court, and the claimant appealed from the judgment thereupon rendered.

The cause was submitted for the appellant on the brief of *Reed & Reed*, and for the respondent on that of *Thomas A. E. Weadock*, executor, *in pro. per.*

MARSHALL, J. The vital question on this appeal is not whether the allowance of the appellant's claim in the Minnesota court was *res adjudicata* of its validity in the county court of Douglas county, under the full faith and credit clause of the federal constitution, as to the effect of the judicial proceedings of one state in the courts of another. Considerable learning on that subject is displayed in the brief of counsel for appellant, but we fail to see how it applies to this case. The sole question demanding consideration here is, Did the allowance of the claim in the Minnesota court give to it any different status as regards the statute of limitations (sec. 3844, Stats. 1898) upon the life of claims against estates of deceased persons in this state, than that of any other claim?

Such section provides that, "every person having a claim against a deceased person, proper to be allowed by the court, who shall not, after notice given as required by section 3840, exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever." Sec. 3840 gives a remedy for the collection of claims against the estates of deceased persons and provides for a

time limit to be fixed for the filing of such claims in the county court, and for giving notice of such time to all parties interested. The remedy thus provided is the sole remedy for the collection of claims against an estate in the courts of this state where notice has been given of the time limit for the filing of claims as therein provided. *Price v. Dietrich*, 12 Wis. 626; *Lannon v. Hackett*, 49 Wis. 261. It applies to nonresidents as well as residents. *Carpenter v. Murphey*, 57 Wis. 541; *Austin v. Saveland's Estate*, 77 Wis. 108; *Winter v. Winter*, 101 Wis. 494. And that, and sec. 3844 extinguishing claims, so far as enforcement thereof is concerned in the courts of this state, not filed as provided by sec. 3840, admit of no exception in favor of nonresidents. *Winter v. Winter*, *supra*.

The statute itself is so plain, and the decisions of this court as well, that no room is left, as it seems, for the court to say otherwise than that the appellant's claim was barred by the laws of this state before it was filed with the county court of Douglas county. The bar of the statute covers all claims, whether belonging to residents or nonresidents, whether put in judgment in a foreign court or in a court of this state before being filed in the probate proceedings.

This is not a case where the court has power to relieve the appellant from the effect of his negligence, ignorance, or mistake, in failing to file his claim in the county court of Douglas county within the time allowed by law. The statutes left him no remedy, after the lapse of the time fixed by the county court for the filing of his claim. Therefore his right, so far as this state is concerned, died with the lapse of the remedy to enforce it, and the persons interested in the estate of Mundy became thereby possessed of a vested right to insist upon the bar of the statute, which is within the protection of the constitution as a property right and that cannot be taken away from them by the court. *Eingartner v. Illinois S. Co.* 103 Wis. 373. The bar of the statute abso-

lutely extinguished the claim. It could not be waived by any failure to plead the statute in the county court (County Court Rule XIII, sec. 6), or by any act on the part of the executor.

From what has been said it is plain that the circuit court had no other course to pursue than to affirm the judgment of the county court, upon the ground that appellant no longer had a claim against the estate of Mundy that could be recognized in the courts of this state.

By the Court.—Judgment affirmed.

BOSTWICK, Respondent, vs. VAN VLECK, Appellant.
BOSTWICK, Appellant, vs. VAN VLECK, Respondent.

March 20—April 6, 1900.

Judgments: Correction of clerical errors: Foreclosure of mortgage: Setting aside sale and deficiency judgment.

1. A clerical mistake in a judgment, whereby it fails to correctly express the decision pronounced, may be corrected by the court without regard to time, saving the rights of innocent third persons, if no equity of any party to the record be thereby violated.
2. A clerical mistake in a judgment, subject to correction as above indicated, exists where there has been an attempt to preserve of record the judgment actually pronounced, not where there has been an erroneous omission to pass upon some material question or such a question erroneously passed upon.
3. The correction of a mere clerical mistake in a judgment of foreclosure does not make a new judgment. The corrected judgment will stand as effective for all purposes as if properly entered in the first instance.
4. If a sale, pursuant to a judgment of foreclosure of a mortgage, be set aside because of a clerical mistake therein, and a resale be ordered, a judgment for a deficiency rendered pursuant to the report of the first sale should be set aside, because the remedy for the collection of the mortgage indebtedness by a sale of the entire mortgaged property must be exhausted as a condition precedent to such a judgment.

[Syllabus by MARSHALL, J.]

APPEALS from orders and a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The action was for the foreclosure of a mortgage on three parcels of real estate, one described as "*the east half* of the west half of the northeast quarter of the northeast quarter, being ten acres of section 34, town 48, range 15 west, in Douglas county, Wisconsin." The description in the complaint was correct. Such proceedings were duly had that a judgment of foreclosure and sale was ordered in accordance with the complaint. In the draft for the judgment, signed pursuant to the aforesaid order, a clerical error was made in that the land particularly mentioned was described as "*the northeast* one-half of the west one-half of the northeast one-quarter of the northeast one-quarter, being ten acres of section 34, town 48, range 15 west, in Douglas county, Wisconsin." The judgment contained the usual provision for a deficiency judgment against the defendant, *B. Jarvis Van Vleck*, who was personally liable. After one year from the entry of the judgment, such proceedings were duly had pursuant thereto that the mortgaged premises, as described in such judgment, were separately sold, the one erroneously described as aforesaid being sold for $100. Such sale was reported to and confirmed by the superior court, and a judgment against *Van Vleck* for a deficiency, in accordance therewith, was ordered. A sheriff's deed was made to plaintiff, the purchaser, and a deficiency judgment was rendered in his favor in accordance with the aforesaid order. A short time thereafter the error in the description of the ten acres was discovered, and thereupon a motion was made to the court, on due notice to *Van Vleck*, for a correction of the judgment in that regard. The motion was granted May 24, 1899, and a resale of the misdescribed land ordered. The deficiency judgment was set aside on the court's own motion, to which plaintiff excepted. Notice of a resale of the ten acres, dated March 31, 1899, was published March 26, 1899, and once each week thereafter up to and including May 7,

1899, the date of the last publication. The sale was made pursuant to such notice, May 15, 1899, plaintiff being the purchaser for $100, leaving a deficiency of $4,599.40. A report of the sale was made in accordance with the facts, which, on motion of the plaintiff and notice to defendant *Van Vleck*, was confirmed, and judgment ordered against *Van Vleck* for the amount of the deficiency specified in such report. *Van Vleck* excepted to the order confirming such sale and took this appeal from such order and from the deficiency judgment. Plaintiff appealed from the order vacating the first deficiency judgment.

The cause was submitted for the plaintiff on briefs by *Henry W. Gilbert* and *H. C. Sloan*, and for the defendant on the brief of *A. B. Ross*.

MARSHALL, J. The only assignment of error argued on the appeal of defendant *Van Vleck* is that the sale was prematurely made; that the corrected judgment was a new judgment, and that the plaintiff should have waited one year before causing the property to be sold under it, as required by sec. 3162, Stats. 1898.

The amendment did not make a new judgment. It merely corrected the written evidence of the judgment actually rendered so as to conform to the truth. The judgment pronounced by the court was what governed. That was not changed by the amendment. The difficulty grew out of a mere clerical error which it was competent for the court to correct in accordance with the facts, and without regard to time, since the rights of third persons had not intervened and there were no equitable considerations, as regards any party to the record, standing in the way.

The power of the court over such matters was very recently fully considered by this court in *Packard v. Kinzie Ave. Heights Co.* 105 Wis. 323. Most of the cases previously decided here, touching the question, will be found there cited, together with references to elementary works on the subject.

The test to be applied in determining whether an error in a judgment is of a judicial character, or a mere clerical mistake which may be corrected in the court where it was made at any time, saving intervening rights of third parties and with due regard to equitable considerations, is whether the error relates to something that the trial court erroneously omitted to pass upon or considered and passed upon erroneously, or a mere omission to preserve of record, correctly in all respects, the actual decision of the court, which in itself was free from error. If the difficulty is found to be of the latter character, it may be remedied as a mere clerical mistake, which will not have the effect to change the judgment pronounced in the slightest degree, but merely to correct the record evidence of such judgment.

In the light of the test above mentioned, it will be readily seen that the position of appellant *Van Vleck* is unsound. The judgment was ripe for a sale of the mortgaged property as soon as the correction thereof was made. It follows that the order confirming the second sale, and all the proceedings in regard thereto, were free from error so far as relates to the question above discussed.

The order setting aside the deficiency judgment first entered was proper. The foreclosure judgment authorized a judgment for deficiency only in case a sale of the entire mortgaged premises failed to realize a sufficient amount to satisfy the mortgage indebtedness. The sale of a part of the mortgaged premises having been set aside, the condition precedent to a deficiency judgment did not exist. Therefore the order setting aside such judgment necessarily followed the order setting aside the sale.

By the Court.— The order confirming the sheriff's report of sale, and the judgment for deficiency, are affirmed on the appeal of defendant *Van Vleck;* and the order setting aside the first deficiency judgment is affirmed on the appeal of plaintiff.

JONES and another, Appellants, vs. WASHBURN COUNTY, Respondent.

March 20—April 6, 1900.

Counties: Disallowance of claim: Evidence.

1. In an action against a county to recover the amount of a claim which had been presented to the county board but, it was alleged, had neither been allowed nor disallowed, the original bill filed with the county board was not, by itself, evidence of any fact tending to support the cause of action.
2. A bill against a county, consisting of several items amounting to $277.60, was presented to the county board and referred to the proper committee, who recommended that it be allowed at $25.10. The report was adopted and an order for the amount allowed drawn and paid. Instead of designating each particular item allowed and disallowed as required by sec. 678, Stats. 1898, the last three items, amounting to the sum allowed, were marked with a bracket, and that amount written opposite it. *Held*, that there was a complete disallowance of the bill except as to the three items mentioned.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiffs are partners engaged in the newspaper business. They bring this action in the circuit court for Washburn county, and allege that between July 16 and October 29, 1896, they published an election notice of the county, which was reasonably worth $151; that during the same fall they published ninety-one squares of official ballots, reasonably worth $91, and a head notice to a tax list, reasonably worth $9.60. The complaint further sets out that on January 13, 1897, the plaintiffs presented a bill to the county board, giving a detailed list of items aggregating $252.50, which go to make up the several sums above stated, which was duly verified; that said bill was laid over until the annual meeting November 10, 1897; and that the board adjourned without having allowed or disallowed any of the items of said bill.

The answer admits the filing of a bill by the plaintiffs which contained the items in the bill set out in the complaint, and also other items amounting to $25.10, which bill was duly considered by the board, and the items last mentioned were allowed, and the others disallowed, and that no appeal had been taken therefrom. Other matters of defense were also set up in the answer, which are not material to this appeal. The answer also contained a general denial of all matters not admitted.

On the trial the plaintiffs offered no testimony to support their cause of action, any further than to call the county clerk, who produced the original bill filed with him, which was offered and received in evidence. The defendant offered evidence as to the action of the county board upon the bill, and the court made findings as follows: That the bill in question was filed and presented to the county on July 13, 1897; that the last three items of the bill, amounting to $25.10, were allowed, and all previous items disallowed; that the last three items had been paid to the plaintiffs. As conclusions of law, the court held that the plaintiffs could not maintain this action; that their remedy was to have taken an appeal from the action of the county board. Judgment dismissing the action and for costs was rendered against plaintiffs, from which they have taken this appeal.

For the appellants the cause was submitted on the brief of *A. L. Bugbee.*

L. H. Mead, district attorney, for the respondent.

BARDEEN, J. There are two good and sufficient reasons why the judgment in this case should be affirmed:

1. No proof was offered to support the allegations of the complaint. The answer admits that plaintiffs filed a bill with the county board, and denies other facts stated. The only proof offered on behalf of the plaintiffs was to the effect that a certain bill offered in evidence had been filed

with the county board. Standing by itself, the bill was not evidence of any fact tending to support the plaintiff's cause of action. As matters then stood, the court would have been justified in dismissing the complaint.

2. The proof offered by defendant showed that the bill in question had been filed with the county clerk, and laid before, and had been considered by, the county board. The bill set out in the complaint and the one filed with the county clerk were alike in all particulars, except that the latter had three additional items, not contained in the former bill. When presented to the county board, the bill was referred to the proper committee. The report was as follows: "G. L. Jones & Co., $277.60; allowed at $25.10. Report of the committee on bills: We, the undersigned, have carefully considered the above bills, and recommend that they be disposed of, marked opposite each bill." This report was adopted by the board, and an order for $25.10 was drawn in favor of plaintiffs and paid. The items composing this amount were the last three items of the bill, and were marked with a bracket, opposite which the amount mentioned was written. The appellants claim that because the board did not designate each particular item allowed and disallowed, as required by sec. 678, Stats. 1898, there was no disallowance of the bill, from which to take an appeal. It is true that the action of the board was not in conformity to the statute, yet there can be no reasonable question as to the fact that, considering the action taken, there was a complete disallowance of the bill, except as to the three items mentioned. The court has so found, and with that conclusion we certainly agree. So, upon either ground stated, the judgment of the court below must be affirmed.

By the Court.—So ordered.

THE S. D. SEAVEY COMPANY, Respondent, vs. THE UNION TRANSIT COMPANY, Appellant.

March 20 — April 6, 1900.

Carriers: Breach of contract: Delivery to another carrier: Liability for loss.

A railway company received goods consigned to plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road, in care of a certain steamship company at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience defendant transferred the goods at Duluth to a railway company to be carried to West Superior, and while in possession of such railway company the goods were damaged. *Held:*

(1) Except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the duties and responsibilities of an intermediate and forwarding carrier are irrelevant.

(2) The delivery to another carrier at Duluth was a breach of defendant's contract and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The Delaware, Lackawanna & Western Railroad received certain goods consigned to the plaintiff, resident at West Superior, upon a bill of lading providing for their transportation over that company's road, in care of the Northern Steamship Company, for delivery to the plaintiff at West Superior, to which point it operated a regular line of freight boats. That contract contained printed provisions exempting the railroad company from liability beyond its line

and constituting it merely a forwarding agent. At Buffalo the merchandise was delivered by the railway company to the defendant, the *Union Transit Company*, which ran a line of steamboats from Buffalo to West Superior and Duluth. The manifest was in the following words: "Lake Manifest No. 3,058–187, Made at Buffalo, N. Y., Nov. 7, 1897. Freight forwarded by the Delaware, Lackawanna & Western Railroad, via the *Union Transit Co.*, to West Superior, on steamer Portage, trip No. 13." No notice or knowledge of the original transportation contract was given to the defendant. For reasons of its own convenience, the steamer Portage did not go to West Superior on that trip, but direct to Duluth, where it transferred these goods to the Omaha Railroad for transportation to the plaintiff, to whom they were delivered by the railroad company, damaged while in its possession by freezing and loss $156.25. Upon trial of the case by the court without a jury, the foregoing facts, together with others, were found, and judgment was rendered in favor of the plaintiff and against the defendant for said amount, with interest and costs, from which this appeal is taken.

For the appellant there was a brief by *H. H. Grace* and *Searle & Spencer*, and oral argument by *Mr. Grace.*

H. V. Gard, for the respondent.

DODGE, J. Much argument was indulged in as to the duties and responsibilities of an intermediate and forwarding carrier under the terms of the transportation contract entered into with the Delaware, Lackawanna & Western Railroad, which is quite irrelevant to the present situation. That contract can have no force here, save as it constitutes the railroad company a forwarding agent for the owner of the goods. The contract made by it in that capacity with the defendant was an entire one, for transportation to West Superior on a specified vessel. It did not contemplate that the defendant

was to carry to some other point and then forward by a different carrier to the plaintiff. The contract was broken, and defendant's duty as a carrier was disregarded. No excuse for failure to deliver via the vessel Portage at West Superior is offered, except that, owing to the small amount of freight for that point and the lateness of the season, the defendant preferred to proceed direct to Duluth and transmit the goods by car to West Superior. This goes only to the convenience of the defendant, which cannot excuse its breach of duty by such considerations. Under its contract it had no right to adopt any method other than that specified for transportation and delivery of the goods, and, when it did so, it became liable as an iusurer for any injury that might result by reason of its unauthorized act. *Johnson v. N. Y. C. R. Co.* 33 N. Y 610, 612; *Goodrich v. Thompson*, 44 N. Y. 324, 334; *Wilts v. Morrell*, 66 Barb. 511. The injury to and loss of plaintiff's property would not have occurred had defendant performed its duty as expressed in its contract, and it cannot escape liability therefor. The judgment is right.

By the Court.— Judgment affirmed.

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PINNEY, Respondent, vs. PROVIDENCE LOAN & INVESTMENT COMPANY, imp., Appellant.

March 20 — April 6, 1900.

Constitutional law: Corporations: Constructive service of process: "Due process of law."

1. In order that a statute authorizing constructive service of summons upon a corporation should be valid, the method provided should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity to be heard and to make a defense.
2. The provision of sec. 1775*b*, Stats. 1898, that until a domestic private corporation has filed with the register of deeds of the county where

its principal office is located a list of its officers upon whom service of process, etc., may be made, such service may be made by leaving a copy of the process, etc., with the register of deeds, is void, being in violation of sec. 1, art. XIV, Amendm. Const of U. S. (which declares that no state shall deprive any person of life, liberty, or property without due process of law).

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

For the appellant there were briefs by *Catlin, Butler & Lyons*, and oral argument by *Thos. E. Lyons.*

For the respondent there was a brief by *Thorson & De LaMotte*, and oral argument by *J. DeLaMotte.*

CASSODAY, C. J. The plaintiff, as the grantee in a tax deed issued to her August 16, 1898, by Douglas county, upon the tax sale of 1895 for the taxes of 1894, claims to have commenced this action October 4, 1898, under sec. 1197, Stats. 1898, against the defendant *Providence Loan & Investment Company*, as the former owner of the land described, and one Sarazin, claiming to be a part owner thereof, to bar them and each of them from all right, title, interest, and claim in and to the lands described. It appears that service of summons was made or claimed to have been made on the defendant Sarazin as a resident of Houghton, Michigan, by publication. There was no appearance in the action, and judgment on default was entered February 25, 1899, according to the prayer of the plaintiff's complaint. The only proof of service of the summons or the summons and complaint on the defendant corporation found in the judgment roll, and upon which such judgment was so entered, is an affidavit of one Fred A. Russell, who became the register of deeds in January, 1899, to the effect that October 4, 1898, there was filed in his office as such register the summons and complaint in this action by delivering to and leaving with such register true copies thereof; that at that time the defendant corporation had filed no list containing the names of its president,

vice-president, secretary, treasurer, or managing agent on whom service of process, notice, or orders might have been made, as provided in subd. 10, sec. 2637, Stats. 1898; that such *Providence Loan & Investment Company* was then a private corporation, organized and existing under the laws of the state of Wisconsin; and that its principal offices were in the city of Superior, Douglas county. On September 22, 1899, the defendant corporation appeared in the action by attorneys *specially*, and appealed to this court from the judgment in favor of the plaintiff and against such corporation, barring it from all right, title, and interest in the land described in such complaint and judgment.

On February 14, 1900, the plaintiff obtained an order upon the appellant to show cause why the plaintiff should not be allowed to amend her proof of service by filing with and making a part of the record certain affidavits thereunto attached. Upon the hearing of that motion it appeared from such affidavits that October 4, 1898, the plaintiff's attorney and the then register of deeds, P. A. Sandberg, searched the register's office, and found no list of officers of the defendant corporation; that the plaintiff's attorney then gave the summons and complaint to such register, who handed the same to his deputy, W. H. Smith, who filed the same and made the entry, under date of October 4, 1898: "Numerical Index Book, No. 110,482. Service on Providence Loan & Trust Co., filed." It further appeared upon such motion from an affidavit of Fred A. Russell, explaining his former affidavit, mentioned, to the effect that the only knowledge he had at the time of making that affidavit was such entry in the index book, above quoted; that he never saw the papers until February 21, 1900, and then found them among the files of notices of *lis pendens*. It also appears from the affidavit of one of the attorneys for the defendant corporation, in effect, that the summons and complaint were delivered to one A. C. Titus, October 4, 1898, but that, as A. C. Titus

was not an officer or agent of the defendant corporation, he paid no further attention to such service; that a few days thereafter he inquired of the register of deeds, Sandberg, who, after search in his office, said there were no papers in any such action on file therein; that September 1, 1899, he first learned that such judgment had been entered on default February 25, 1899.

The facts in regard to the summons and complaint having been delivered to and left with the register of deeds by the plaintiff's attorney October 4, 1898, are undisputed, and show a compliance with sec. 1775*b*, Stats. 1898, as it then stood. As indicated, the defendant company was then a private corporation organized and existing under the laws of this state, and had its principal office in the city of Superior. By the statute cited it was required, on or before October 1, 1898, to file in the office of the register of deeds of that county a list of the names of its officers therein mentioned "on whom service of process, notices, or orders" might be made as provided by subd. 10, sec. 2637. The right of the legislature to require such corporation to so file such list is not and cannot be successfully questioned. It has been said upon high authority that: "A state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law." *Pennoyer v. Neff*, 95 U. S. 735, 736. Sec. 1775*b* was also made applicable to such corporations formed after October 1, 1898. That section also provided that "in all cases until such list of officers is so filed as aforesaid service of all legal process, notices, orders or other legal proceedings may be lawfully and effectually made upon any such corporation by delivering to and

leaving with the register of deeds where such corporation has its principal office true copies of such legal process, orders, notices or proceedings, in which case service so made shall be valid." The subsequent amendment of that section does not affect the question here presented. Ch. 46, Laws of 1899.

It does not appear that any attempt was made to serve the summons or summons and complaint on any of the officers of the defendant corporation, as required by subd. 10, sec. 2637, Stats. 1898; nor by the publication of the summons, as required by sec. 2639. As indicated, the only service or attempted service of the summons or summons and complaint in this action upon the defendant corporation was "by delivering to and leaving with the register of deeds" true copies of such summons and complaint, as required by the statute quoted. The important question which here confronts us is whether such service was valid and binding upon the defendant corporation; in other words, Was such service sufficient to authorize the judgment forever barring the corporation from any and all right, title, and interest in and to the land described? For the purpose of this appeal it must be assumed that at the time of the alleged service the defendant corporation had the lawful and rightful title and possession to the land. Was it deprived of such right, title, and interest in and to the land by due process of law? In other words, Is the clause of the statute quoted, authorizing such service upon the register of deeds, a valid law?

The constitution of the United States declares that "no state shall . . . deprive any person of life, liberty, or property, without due process of law." Sec. 1, art. XIV, Amendm. Const. of U. S. The words "without due process of law" were borrowed from a very early English statute, as an improved rendition of the words contained in Magna Charta. 1 Coke, Second Inst. 50; *Murray's Lessee v. Hoboken L. & I. Co.* 18 How. 276; *Davidson v. New Orleans*, 96 U. S.

101. In the first of these cases it was said by Mr. Justice CURTIS, speaking for the court, that: "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." P. 276. And again he said in that case: "For, though 'due process of law' *generally* implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet this is not universally true." 18 How. 280. In the last case above cited Mr. Justice MILLER, speaking for the court, said: "A statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision." *Davidson v. New Orleans*, 96 U. S. 102. That court has frequently declared, in effect, that the words "without due process of law" were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. *Bank of Columbia v. Okely*, 4 Wheat. 244; *In re Kemmler*, 136 U. S. 448; *Leeper v. Texas*, 139 U. S. 462; *Duncan v. Missouri*, 152 U. S. 377; *Marchant v. Pa. R. Co.* 153 U. S. 380. In the language of Mr. Justice FIELD: "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained. And, wherever it is necessary for the protection of the parties, *it must give them an opportunity to be heard* respecting the justice of the judgment sought.

The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights." *Hagar v. Reclamation Dist.* 111 U. S. 708. So it has been held by that court that, where a state statute authorized a commission to finally and conclusively fix the rates of charges by railway companies for the transportation of property, without an opportunity for judicial inquiry as to the reasonableness of such rates, such companies were deprived of their property without due process of law. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418. That court has just held that, although personal service on nonresidents, outside of the jurisdiction of the court, may, under proper circumstances, be sufficient to constitute due process of law in a suit for the foreclosure of a lien upon land within the state, yet that only five days' notice in such a case, under the circumstances stated, was "insufficient to constitute reasonable notice or due process of law." *Roller v. Holly*, 176 U. S. 398.

The important thing in all ordinary actions, and especially in a case like this, is that, before a person shall be deprived of his property by legal proceedings, he shall have actual or constructive notice and an opportunity to be heard. It is settled by numerous adjudications of the supreme court of the United States that a corporation is a "person" within the meaning of the constitutional clause in question. *Smyth v. Ames*, 169 U. S. 466, 522, and cases there cited. It follows that the defendant corporation cannot be deprived of its property without due process of law, any more than any citizen of the state. While foreign corporations may be permitted to do business within the state upon certain conditions, or be excluded altogether, and while domestic corporations may be subject to reasonable regulations and control, yet neither can be deprived of its property without

due process of law. Undoubtedly, the legislature may, as it has in certain cases, authorize constructive service of summons to be made upon corporations, as well as individuals, especially where the action concerns property located within the state; but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard and making a defense before the determination. Such service was not secured "by delivering to and leaving with the register of deeds . . . true copies" of the summons and complaint, as prescribed by the portion of the statute quoted. On the contrary, such service, if held to be effectual, would be well calculated to conceal from the officers and agents of the corporation the fact that such an action had been commenced. True, the register is a public officer, with duties prescribed by statute; but he is in no sense the agent or representative of "private corporations, incorporated or organized under any law of this state." Such corporations are supposed to be clothed with authority to select and appoint their own officers and agents. We must hold the clause of the statute in question to be unconstitutional and void.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

PEAKE, Appellant, vs. CITY OF SUPERIOR, Respondent.

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113 [2]335
106 403
114 [1] 82

March 21—April 6, 1900.

Municipal corporations: Defect in street: Injury to traveler: Special verdict: Duplicity in question: Duty as to original construction and subsequent defects: "Ordinary care."

1. In an action against a city for injuries alleged to have been caused by a defect in a street, the jury answered in the negative a question in the special verdict, "Was the defendant guilty of any want

of ordinary care in respect to the maintenance of the street in a proper state of repair?" *Held*, that the question covered two controverted issues,—(1) whether there was a defect, and (2) whether, if so, there had been negligence in discovering and repairing it,—and its submission was error prejudicial to plaintiff.

2. A "defect" in a street is a lack of reasonable safety; and if the jury find both that there was a defect and that the city had constructive notice thereof and time to repair, this establishes negligence without a further finding that the defect was of such a nature that a man of ordinary care and prudence would reasonably expect that an injury might result therefrom to ordinarily careful travelers.

3. The duty of a city to make a street reasonably safe in its original construction is absolute; but the duty to discover and repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence.

4. "Ordinary care" in such a case is that degree of care which reasonably vigilant and careful officials would and do exercise under similar circumstances.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action for personal injuries resulting to the plaintiff from a fall upon the street in the city of *Superior* August 2, 1898. The evidence showed that the plaintiff was a cripple, and was accustomed to ride about the streets of *Superior*, going to and from his business, in a tricycle. On the day of the accident he was riding upon one of the streets of the city, and endeavored to cross from the pavement of the street to the sidewalk on the corner of Ogden avenue and Eleventh street. At this point there is a gutter between the pavement of the street and the curbstone of the sidewalk, the depth of which does not appear with certainty; but it was eleven inches in width, and was bridged by two-inch planks, eight feet in length, running parallel with the curb, and arranged so as to be removed for the purpose of cleaning the gutter beneath. The edge of the plank toward the sidewalk was on a level with the curb, and it was intended to be supported upon that level by

means of three iron straps which were spiked on the under side of the plank, and extended up on the curb side thereof, with a flange at the top, so as to rest on the curb. It appears that, while the plaintiff's tricycle was going over this plank, it was in some manner upset, and the plaintiff was thrown into the gutter, receiving serious injuries. The plaintiff's evidence tended to show that the plank was at the time loose at one end, either on account of a defective strap and flange or because of the absence of the flange entirely, so that this end of the plank dropped when the wheel of the tricycle passed over it, thus upsetting the same and causing the injuries complained of. There was also evidence on the part of the plaintiff tending to show that the plank had been in this condition for some weeks. On the part of the defendant there was evidence to the effect that the plank was properly fixed in place at the time of the accident, and that there had in fact been no defect in the same.

The following questions were submitted to the jury as a special verdict: "(1) Was the defendant guilty of any want of ordinary care in respect to the maintenance of the street in question in a proper state of repair? (2) If your answer to question No. 1 is 'Yes,' then was such want of ordinary care the approximate cause of the injuries complained of? (3) Was the plaintiff guilty of any want of ordinary care that contributed to produce the injuries complained of? (4) What sum of money will compensate plaintiff for the damages he has sustained by reason of the injuries complained of? (5) If your answer to the first question is 'Yes,' then in what respect was this street defective at the time and place of this accident? (6) How long did such defects exist at the time of the accident?"

As to the first of these questions the circuit judge charged the jury, among other things: "Was the defendant guilty of any want of ordinary care in respect to the maintenance of the street in question in a proper state of repair? *In de-*

termining this question, you will consider, first, whether or not the street, at the place and time of the accident, was in a reasonably safe condition for people to travel on in the usual manner of traveling. If you find that it was, then you will answer this first question, 'No.' If, however, you find that there was a defect in the street at the time and place of the accident, then you will consider and determine whether or not such a defect had existed for such a length of time as to give the defendant constructive notice of its existence and a reasonable time for its repair after it had such notice; *and if you find that there was a defect in the street at the time and place of the accident, and that such defect had existed for a sufficient length of time prior to the accident to give the defendant constructive notice of it and a reasonable time within which to repair it after such notice, then you will consider and determine whether or not the defect was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care for travel in the usual and ordinary manner of traveling.* Hence, if you find from the evidence that at the time and place of the accident the street was not in a reasonably safe condition for travel in the ordinary and usual mode of travel; that such unsafe condition had existed for a sufficient length of time to give the defendant constructive notice of its existence and a reasonable time for the defendant to repair it after such notice and before the accident; and that such unsafe condition was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care for travel in the usual and ordinary modes for traveling,—then you will answer this question in the affirmative; otherwise, you will answer it in the negative."

The plaintiff excepted to the submission of the first question, and also excepted to those clauses of the instructions printed in italics. The jury answered the first question

"No," and left the others unanswered. This verdict was received by the court, and judgment for the defendant rendered thereon, and from that judgment the plaintiff appeals.

For the appellant there was a brief by *W. P. Crawford*, and oral argument by *W. R. Foley*. They contended, *inter alia*, that with certain well-recognized exceptions, such as sudden defects from the action of the elements, latent defects, none of which figure in this case, liability for injuries sustained by reason of defective sidewalks is absolute, and the question whether or not ordinary care was exercised cannot be submitted to the jury. Sec. 1339, Stats. 1898; *Ward v. Jefferson*, 24 Wis. 342; *Draper v. Ironton*, 42 Wis. 696; *Burns v. Elba*, 32 Wis. 605; *Koenig v. Arcadia*, 75 Wis. 62.

T. L. McIntosh, for the respondent.

WINSLOW, J. It is entirely plain that the first question of the special verdict covers two controverted issues in the case, viz.: (1) Whether there was a defect in the street; and (2) whether it had existed so long that the city officials should have known and repaired it. The question was answered in the negative, but no one can say whether this answer means that there was no defect, or that there was a defect but that it was so recent that the city was not chargeable with notice thereof. This, however, is not the most serious vice in the question. Some of the jury may have been satisfied that there was no defect, and others that there was a defect but that it was so recent as not to charge the city with notice; and, while all would thus agree that the question should be answered in the negative, there would be no agreement upon the facts. This is just the difficulty which the special verdict is intended to obviate. "Special verdicts are worse than useless if courts do not submit for them *single*, direct, and plain questions, and insist upon positive, direct, and intelligible answers." *Carroll v. Bohan*, 43

Wis. 218. The plaintiff was entitled to have the jury say, in answer to simple and direct questions, (1) whether there was a defect; and (2) whether, if so, there had been negligence in not discovering and repairing it. To combine the two questions in one, so that a negative answer would inform no one what the conclusions of the jury were upon them separately, or, in fact, whether any unanimous conclusion at all was reached upon the separate questions, was, we think, prejudicial error, under the circumstances of this case.

In submitting this question the court recognized its dual character, and charged the jury first to consider and determine whether or not the street was reasonably safe (*i. e.* whether there was a defect), and if they found there was a defect, then to determine whether it had existed so long as to give defendant constructive notice of its existence and time to repair it. So far the charge seems unexceptionable. But the court then proceeded to say, in substance, that, if they found both defect and constructive notice, they must go further, and determine whether "the defect was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care." This involves confusion in terms, to say the least. A "defect" in the street is a lack of reasonable safety. If the street is not reasonably safe, and the city has constructive notice thereof and time to repair, then the city's negligence is established, and its liability to respond to one injured thereby while exercising ordinary care is certain. But the court, in effect, said that if there was a defect (*i. e.* lack of reasonable safety), and constructive notice thereof and time to repair, still this was not sufficient, but that, in order to find defendant guilty of negligence, they must go further, and find that the defect was of such a nature that men of ordinary care and prudence would reasonably expect would result in injury to ordinarily care-

ful pedestrians. This test of the character of the street was distinctly repudiated in *Draper v. Ironton*, 42 Wis. 696; and it was said that the jury should be left to determine, from all the evidence as to its condition, whether the highway was or was not in a reasonably safe condition for travel, and should not have been restricted to the inquiry as to what a certain class of persons might think as to the probability of accidents happening to ordinarily careful travelers. Whatever might be said about the reasonableness of this test, as an original proposition, we see no occasion now to overrule the *Draper Case*. Certainly, in the present case, when the court told the jury that after they had found a defect and found constructive notice they must still go further and find an additional fact presumably different from anything they had before found, we think it was misleading and prejudicial.

There was considerable discussion in the briefs in this case as to the question whether the city is under an absolute duty to make and keep the streets in a reasonably safe condition, or is only bound to the exercise of reasonable and ordinary care. It seems to have been thought by counsel that there has been a change in the position of this court upon this subject since the case of *Ward v. Jefferson*, 24 Wis. 342. That case simply held that, where a highway was defectively constructed by the municipality, the statutory duty never had been performed, and the liability of the municipality for injuries resulting from such defect to travelers exercising ordinary care was absolute. Such a defect being established, the negligence of the town is conclusively proven, and the jury cannot find that ordinary care has been exercised. On the other hand, it was said in that case, in substance, that if the highway was originally constructed with reasonable safety, but afterwards became defective by action of the elements or the act of a third person, and a traveler was injured thereby, the question whether the municipal officials had no-

tice of the defect, or had exercised ordinary and reasonable care and diligence in inspecting the highway and repairing the defect, arises, and must be decided. In other words, the duty to make the street reasonably safe in its original construction is absolute; but the duty to discover and repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence. This latter duty may properly be called the duty to exercise ordinary care, if the term "ordinary care" be properly defined. If the question be submitted to the jury in that form, however (namely, in the form of an inquiry whether the municipality has exercised ordinary care in its inspection and repair of streets), it is manifest that some instruction should be given to the jury as to what constitutes ordinary care in such a case; otherwise, the question may well be misleading. Highway officials are bound to exercise reasonable vigilance in the care of the streets under their charge, and it is only that degree of care which reasonably vigilant and careful officials would and do exercise under similar circumstances which can properly be called "ordinary care" in such a case as the present. With this explanation of the subject, it is not believed that there has been any material divergence in the decisions upon the subject in this court.

For the reasons given, there must be a new trial.

By the Court.—Judgment reversed, and action remanded for a new trial.

THE STATE EX REL. DONNELLY, Appellant, vs. HOBE, County Treasurer, Respondent.

March 21 — April 6, 1900.

Municipal corporations: Superior city charter construed: Ownership of assessment liens: Collection: Duty of county treasurer: Mandamus.

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The city charter of the city of Superior provides generally for making up the annual city tax roll and extending thereon all general and special taxes against property mentioned and valued therein, upon a uniform percentage thereof, and also for extending on such roll special assessments for street improvement in a separate column against the property affected thereby for the benefit of the owners of the certificates representing such assessments, and for the collection of such burdens on property, and for the disposition of all taxes collected, not specially mentioning such assessments; also, generally, that delinquent returns shall be made to the county treasurer according to the laws regarding such returns by town treasurers. It also specially provides, in plain language, for the return of special assessments not seasonably paid to the city treasurer, and the enforcement thereof thereafter in the manner other delinquent taxes are enforced, "except that all moneys collected by the city treasurer and all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon surrender of such certificate." *Held:*

(1) There is no room to work out, by judicial construction, a theory that the special assessment liens, or money collected in the enforcement thereof in any way, at any time, under any circumstances, become the property of the public represented by the city or county.

(2) The plain legislative intent is that special assessment liens shall constitute private property till actually discharged by payment to the owners thereof, or to the city treasurer, county treasurer, or county clerk, for the use of such owners, and that such liens shall be enforced as such private property through municipal machinery as the agent of such owners.

(3) The rule applies that, where there is a general provision in a statute covering an entire subject, and a special provision plainly covering some particular part within the scope of such general provision, such special provision must prevail.

(4) The plain intent being that the special assessment liens shall remain private property from first to last, by necessary implication the assessments extended upon the tax roll to discharge such liens must be returned delinquent, if at all, separate from all other taxes, and thereafter be enforced separate from all other taxes, down to and including the issuance of certificates of sale on the tax sale.

(5) If the money to discharge a special assessment lien comes into the hands of the county treasurer at any time before the sale of the property to enforce it, he thereby becomes a trustee thereof for the certificate holder. If the property be bid in at the tax sale for the county and a certificate of sale be taken accordingly, the treasurer, in his official capacity, will thereby become the trustee of such certificate for the owner of the special assessment lien; and if such certificate be sold by the county treasurer in the manner other tax certificates are sold, the money received therefor will constitute a trust fund in his hands for the benefit of the owner of the special assessment certificate.

(6) If the county treasurer receive a tax-sale certificate or money on account of a special assessment returned to him delinquent in either of the methods above indicated, it is his duty to deliver the same to the owner of the special assessment certificate on demand therefor and the surrender of such certificate; and a failure so to do will entitle the owner of such certificate to the remedy by *mandamus* to enforce his rights.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Such proceedings were duly taken by the proper officers of the city of Superior, pursuant to subch. XIII of the charter of such city (ch. 124, Laws of 1891), that certain street-improvement certificates were duly issued for special assessments charged to lots abutting on such street for the improvement thereof, and thereafter the relator became the owner of such certificates. The manner of enforcing collection of such special assessment liens for the benefit of the owners thereof, and the manner by which such owners obtain their money, are indicated in sec. 129 of the charter in the following words:

"The comptroller's statement of the special assessments

to be placed in the next tax roll shall include an amount sufficient to pay said certificates with interest thereon, at the legal rate, from the date of such certificate to the time when the city treasurer is required to make return of delinquent taxes; and thereafter the same proceedings shall be had as in case of other taxes, except that all moneys collected by the city treasurer and all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon surrender of such certificate."

Pursuant to such provision of the charter, there was extended upon the tax roll of the city of Superior, against the proper descriptions of land, special assessments representing the relator's improvement certificates. The owners of the lots affected thereby failed to pay such assessments within the time allowed for the city treasurer to collect the same, and they were therefore returned delinquent to the county treasurer as other delinquent taxes of the city were returned, as the charter directs. After such assessments were collected by the county treasurer, the relator tendered his certificates to such treasurer and demanded payment thereof, which was refused. Thereupon the relator made his verified petition setting forth the aforesaid facts, and, on due notice to the county treasurer, moved the court for a writ of *mandamus* requiring him to comply with the relator's demand for the money collected on the special assessments as stated. The motion was denied, and the relator appealed.

T. L. McIntosh, for the appellant.

For the respondent there was a brief by *Isaac Ross*, district attorney, and *Michael S. Bright*, and oral argument by *Mr. Bright.*

MARSHALL, J. The theory of appellant is that all money collected by the county treasurer on the special assessments was collected for his use by express provision of the city

charter and is his private property; while the theory of respondent is that such assessments, when returned delinquent, became the property of the county the same as other delinquent taxes; that as soon as they were credited to the city of Superior by the county treasurer, pursuant to the general laws of the state regulating the manner of dealing with delinquent taxes, the city, in contemplation of law, had collected them and was liable to the relator for the amount of his certificates, and his recourse for payment thereof was solely to the fund thus accumulated in the hands of the city treasurer. The trial court adopted the latter theory. Which of the two theories is right is by no means free from difficulty. The question must be solved by a careful examination and comparison of the provisions of the charter of the city of Superior covering the subject.

Sec. 27 of the charter (ch. 124, Laws of 1891) provides the basis for the action of the city clerk in placing special assessments for street improvements in the city tax roll, in the following language: "He [the city comptroller] shall make and deliver to the city clerk a list of all certificates for the payment of which special taxes are to be levied in each year, in time for the same to be inserted in the tax roll, in the form of a schedule of special taxes." At this point it will be noted that special assessments are spoken of as taxes. In subch. XII, which treats of assessment and collection of taxes, special assessments are uniformly spoken of as distinct from taxes. Sec. 102 in such subchapter provides that the city clerk shall place before the common council, each year, certain information for their consideration in determining the amount of taxes to be raised for such year, but such requirement does not include anything relating to special assessments. The scheme of the charter is that no action of the common council shall be required as to the placing of such assessments in the tax roll. They are thus placed from information furnished directly to the

city clerk by the comptroller. Sec. 102 further provides that, upon receiving the information required to be placed before the common council in the manner therein indicated, it shall, by resolution, levy such sums of money as may be sufficient for the several purposes for which taxes are authorized. The next section provides that the clerk, upon a uniform percentage, shall extend upon the tax roll, in the manner therein indicated, the taxes levied by the common council, *and shall also enter and extend upon the tax roll all special assessments* and school taxes required to be entered thereon. Sec. 106 provides that, "*All special assessments shall be carried out on the tax roll in a separate column or columns* opposite the lots or tracts upon which the same may be a lien, and the city treasurer shall have the same authority with reference thereto as if the amount of such lien was a general tax." That indicates that the scheme of the charter is that special assessments shall constitute specific liens on specific property for the benefit of the owners of such liens; that such assessments are to be extended upon the tax roll for collection solely for the benefit of such owners; and that they are to be considered separate and distinct from taxes, strictly so called, meaning all burdens on property generally whether imposed for a general or a particular purpose.

The language of sec. 106, that the city treasurer shall have the same authority as to special assessments as in case of general taxes, does not indicate that such assessments are treated at that point as special taxes, strictly so called. The term "general tax" is used with reference to the manner of imposing the tax upon property, in that it is levied thereon generally, by a uniform percentage, according to the value thereof. Taxes are spoken of as special if levied for a special purpose, and general if levied for some of the ordinary purposes of municipal government; but whether taxes be levied for a general or special purpose, if placed upon prop-

erty as a whole in proportion to the value thereof, they are in a proper sense general taxes, as distinguished from special assessments made for street improvements.

Up to this point it is quite clear that the charter indications are that money collected on account of special assessments belongs to the owners of the certificates; that the municipal machinery is put in motion for the collection thereof solely for the benefit of the owners of the assessment liens, and that the municipality, at no point, can obtain any ownership of such liens or the money received in process of enforcing them. Every step in the proceedings to enforce such liens is required to be taken by municipal officers pursuant to a municipal agency for the owner of the certificates, created by law.

It has been repeatedly held by this court that the sole duty of a city, under charter provisions for the payment for street improvements by special assessments upon the property benefited, is to use the proper machinery for the collection of the assessments in the manner indicated by the charter; that the expense of the assessments cannot be made a general city liability in any way. *Finney v. Oshkosh*, 18 Wis. 210; *Fletcher v. Oshkosh*, 18 Wis. 229; *Whalen v. La Crosse*, 16 Wis. 271; *Hall v. Chippewa Falls*, 47 Wis. 267; *Heller v. Milwaukee*, 96 Wis. 134.

It is not claimed by respondent that special assessments, under the charter of the city of Superior, can become a general liability of the city, but it is said that the charter provides that if such assessments be not paid to the city treasurer, after being placed in the tax roll for collection, within the time allowed by law, they shall, with all other delinquent taxes of the city, be used to discharge the liability of the city to the county, and, if in excess of the amount required for such purpose, to obtain a credit with the county to be discharged by it by payment to the city as fast as collections are made; and that as soon as the city thus obtains

the benefit of the special assessments, it should be treated as having in its hands the money to pay the owners of the certificates, though the liens against the lots be not yet discharged. The idea is that, by the manner in which the delinquent special assessments are required to be treated, the county becomes the purchaser of the special assessment liens from the city with the right to enforce them for its own benefit, and the city becomes the trustee of a fund actually in hand to take up the special assessment certificates the same as if such fund were created by collecting the money of the lotowners affected by such assessments. That is based on the language of sec. 111 of the charter, which reads as follows: "Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, and shall then set aside all sums of money levied for school and library taxes, then taxes for the payment of principal and interest on the public debt, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then the taxes for bridge purposes, then for fire purposes, then for street and other public improvements, and lastly county taxes. Delinquent returns shall be made to the county treasurer, the same in all respects as required by the general laws of this state, and thereafter such proceedings shall be had with reference to the delinquent taxes so returned to the county treasurer as are provided for in case of delinquent returns from towns."

Now, if the theory of the respondent be correct, we must be able to find in the section quoted where the treasurer is required to set aside money to provide for the payment of special assessments. That is evident, for he cannot be compelled to pay such assessments out of money set aside for some other purpose, and a construction would be too unreasonable to be adopted which would result in holding that special assessments can be used by the city to pay its liabilities to the county and there be no equivalent fund for im-

mediate use, with which to take up the special assessment certificates.

In the opening lines of the section it says that the amounts placed in the tax roll of the city for the various municipal purposes shall be satisfied out of the *taxes* collected. In substantially all previous provisions of the charter, rightly considered, the term "tax" is used as distinct from special assessments, so it is reasonable to say that special assessments, at this point, are not included in the term "taxes collected." One of the purposes to be satisfied by the setting aside of money from taxes collected, is "special taxes in the order in which they are levied." The term "special taxes" at this point evidently refers to taxes levied by resolution of the common council for some special purpose. The term, "in the order in which they are levied," can have no reference to special assessments. Such assessments are not "levied" in the sense in which that term is obviously used in the section. Again, if the delinquent return of special assessments results in there being an equivalent of money in the hands of the city treasurer for the payment of such assessments, there can be no priority of one of such assessments over another. So it is very evident that the term "special taxes" has no reference to special assessments.

The only other purpose mentioned in the section, that the city treasurer is required to satisfy out of taxes collected by him, which by any possibility can include special assessments, is covered by the term "taxes raised for street and other public improvements." Consistent with the entire scheme, up to this point, it is reasonable to say that the term "taxes" does not here include special assessments, because, as indicated, the two species of burdens are uniformly differently designated, and the language "street and other improvements" refers to taxes levied by resolution of the common council. The special assessments, if respondent's theory be correct, can all be absorbed by the city by using

the same to pay its liabilities to the county, without any fund being left in the city treasury with which to pay the assessment liens to the owners thereof. That, as before suggested, is too unreasonable to be adopted, even if the question of the absolute invalidity of such a scheme were not raised.

But the section says that the delinquent return shall be made to the county treasurer the same in all respects as required by the general laws of this state relating to towns, and that thereafter such proceedings shall be had with reference to the delinquent taxes so returned as are provided for in case of delinquent returns from towns. That obviously incorporates the general law of the state, regarding the return of delinquent taxes from towns, into the city charter. However, if it refers to special assessments as well as to taxes strictly so called, still it must be noted that the distinction in all the preceding provisions of the charter between taxes and special assessments was in the legislative mind at this point. For while provision was made for the delinquent return in general language — including all burdens upon property, whether in the form of taxes strictly so called or special assessments — when it came to provide for the treatment of liens upon property represented by the delinquent return after coming to the hands of the county treasurer, only taxes are mentioned, which may reasonably be said to mean taxes imposed generally upon property.

It is certainly reasonable to say, if there be a provision in the charter specially referring to the treatment of special assessments, that only taxes strictly so called were intended to be covered by sec. 111, because, as before indicated, no provision is made for setting aside, by the city treasurer, for the benefit of the owners of special assessment liens, an equivalent for such as are included in the delinquent return. So such liens must, it would seem, follow the lands and be owned by the owners of the special assessment certificates

after the delinquent return the same as before, and there must be some machinery provided for the enforcement of such liens. Any other construction of the charter provisions would be so unreasonable as not to admit of adoption, at least if one can be discovered in harmony with the apparent scheme of the charter and the rights of owners of special assessment liens to a continuance of such liens till a fund shall have been actually provided in the hands of the agent of the lien claimants to take up their certificates.

At this point we are met with *Sheboygan Co. v. Sheboygan*, 54 Wis. 415, where it was held that the principle of sec. 1114, R. S. 1878, is that the county shall assume all delinquent taxes and become liable to the municipality returning the same, and that if such return includes special assessments for street improvements they shall take the same course as other delinquent taxes; that the word "taxes," as used in the section, includes taxes of every nature, special assessments as well as general taxes, and that in case of a special assessment lien, it is discharged, so far as the certificate holder is concerned, as soon as the municipality obtains credit for the delinquent return representing the same, and that such certificate holder is entitled to immediately call upon the city treasurer for his money. That might rule this case if there were nothing in the charter under consideration clearly excepting special assessments from the provisions of sec. 1114, Stats. 1898, regarding the ownership by the county of tax liens returned delinquent. Sec. 129 of the Superior charter provides specially for the collection of special assessments for the benefit of the owners of the assessment certificates, treating the assessment liens as private property from the time the amount thereof is extended on the tax roll until finally realized, whether by payment before or after the assessments are returned delinquent to the county treasurer. The language of the section is as follows: "The comptroller's statement of the special assess-

ments to be placed in the tax roll shall include an amount sufficient to pay said certificates with interest thereon, at the legal rate, from the date of such certificate to the time when the city treasurer is required to make return of delinquent taxes; and thereafter the same proceedings shall be had as in case of other taxes, except that all moneys collected by the city treasurer and all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon surrender of such certificate." That language seems plain. It makes the city, by its treasurer, the agent of the owner of the special assessment liens for the collection thereof, till his delinquent return shall have been made, and thereafter the county such agent by its county treasurer and county clerk.

It is impossible to adopt the theory upon which this case was decided in the court below, and which is insisted upon here by respondent, and give effect to the words of sec. 129, "all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon the surrender of such certificate." It will be noted that the holders of certificates are expressly referred to as the owners of the special assessment liens down to the time of their actual collection, whether by the city treasurer or the county treasurer or the county clerk. The idea plainly expressed is that such liens remain upon the lands charged, as the private property of the certificate holders, until an equivalent therefor in money shall have been actually placed in the hands of some one of the officers mentioned for payment to such holders upon the surrender of their certificates. That is wholly inconsistent with the theory that the certificate holders cease to be the owners of the special assessment liens as soon as the tax, so called, extended upon the tax roll for their discharge, passes into the hands of the county treasurer as a part of the delinquent return from the city treasurer.

The whole scheme of the charter, from first to last, is that, while proceedings for the collection of special assessments must be the same as for the collection of general taxes, they are to be treated as purely private property and kept, at every step, separate and distinct from other taxes, the public having no interest in them whatever. The special assessment liens are required to be returned delinquent if not seasonably paid to the city treasurer, but to be kept separate by such return necessarily, and thereafter separately enforced, if not seasonably paid, by advertisement and sale of the property affected thereby.

The provision to the effect that special assessments shall be treated as other taxes does not indicate that they are to be confused with other taxes and that the entire amount, composed of special assessments and general taxes, is to be treated in one sum as a lien against the property affected. Such assessment liens cannot be reasonably treated as solely the private property of the certificate holders except by a delinquent return, keeping special assessments separate from other taxes, and subsequent proceedings to enforce such liens, if such proceedings become necessary, including advertisement of the lands affected by the assessment liens for sale separately therefor and the issuance of certificates of sale which shall not include any tax liens that belong to the public. In case lands, sold for the purpose of enforcing special assessment liens, are bid in by the county, the certificates of sale, when issued, are not the property of the county, but of the holders of the special assessment certificates. The county, in such circumstances, becomes a trustee of the tax-sale certificates for the actual owners thereof, and the treasurer should turn the same over to them — the holders of the special assessment certificates — on demand therefor and surrender of such certificates. In case of such a sale and of the lands being bid off by some person other than the county, or the county treasurer bidding off the property for the county and then selling the certificates, the money received

by the county treasurer becomes a trust fund for the owner of the special assessment certificates, which should be turned over to him under the plain and mandatory language of sec. 129 of the charter, upon his demand therefor and surrender of such certificates.

The foregoing is the only reasonable construction of the charter provisions referred to, that will give effect to all of them. Any other construction would leave the plain language of sec. 129, as to payment by the county treasurer and county clerk to the owner of the special assessment lien, of money coming into their hands on account of such lien, without any effect whatever.

By due regard to familiar rules for statutory construction, the foregoing indicated result is reached by a logical course of reasoning. A general provision, covering a subject as a whole, must be deemed to have been intended as subordinate to a particular provision relating to a particular element included in such subject. Again, when there is a particular clause of an act, or a special act, and a general clause or act the language of which may be reasonably, though not necessarily, construed to include the subject of the particular clause or act, the presumption is that the latter was intended as an exception. *Mason v. Ashland*, 98 Wis. 540. Both of such rules apply to secs. 111 and 129 of the charter of the city of Superior. The language of sec. 129, in its literal sense, must be taken either as providing specially for street assessment liens, in which case the special provision would prevail over any general provision covering a subject that may reasonably be said to include such liens, or it plainly excepts special assessments out of the general provision of sec. 111. It seems that the clear legislative intent, by the language of sec. 129, was to provide for handling delinquent special assessments as private property separate and distinct from delinquent taxes, strictly so called. It must prevail whether the two sections are in harmony or not. But in

our judgment they are in harmony. It is reasonable to conclude that sec. 111 only refers to taxes other than special assessments. Harmony, not confusion, is to be sought for by statutory construction. Conflicts between different provisions of a statute are not to be held to exist if harmony, by any reasonable construction of them, can be discovered. The true rule has often been stated to be that where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and all the words of each without violence to either, it should be adopted in preference to one which, though reasonable, leads to a conclusion that there is a conflict. There is no conflict between different provisions of a statute if there is a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony. *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Mason v. Ashland*, 98 Wis. 540.

The suggested difficulties in administering the charter of Superior, on appellant's theory, in that after the delinquent taxes reach the county treasurer there is no way by which he can tell what part constitutes special assessments and what part refers to other taxes, all disappear when it is considered, as it must be, that the provision requiring special assessments to be returned delinquent and to be thereafter treated in the same manner as other delinquent taxes, but for the sole benefit of the owners of the special assessment liens, by necessary implication requires such assessments to be specifically noted in the delinquent return, and that in the advertisement of the sale of the lands to enforce the assessment liens they shall be treated separate from other delinquent taxes. According to the relation before us, the special assessments in question, prior to the making of such petition, were paid to the county treasurer; therefore it was his plain duty, on the relator's application for the money

thus collected and offer to surrender his assessment certificates, to have complied with such application.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to issue a peremptory writ of *mandamus* in accordance with this opinion.

THE STATE EX REL. BELL, Appellant, vs. CONNESS, Respondent.

March 21—April 6, 1900.

Elections: Validity: Evidence: Certificate signed by one inspector: Admissions of voters: Corrupt practices.

1. A certificate of the result of an election which was signed by one inspector only, but had the name of another inspector written thereon by a person having no authority to do so, is not *prima facie* evidence of the facts therein stated, even conceding that the duty to sign the certificate might be delegated.
2. In an action to test the title to an office the exclusion of testimony of admissions made by voters as to their qualifications and for whom they voted is not error unless the offer thereof was definite as to the time when such admissions were made and as to their substance.
3. In an action to test the title to the office of town chairman, for which the relator received 253, and the respondent 262, votes, the court found that thirty-one of the votes cast were illegal, and it was reasonably certain that the illegal votes were largely in excess of that number. The evidence was insufficient to show that the relator was entitled to the office, but it appeared, among other things, that both the relator and the respondent connived to secure for themselves the votes of a large number of nonresidents employed in logging camps; that a large number of such men were paid, in the interests of defendant, for the time spent in going to the polls; that liquor was supplied to such an extent that hundreds became intoxicated and the polls were surrounded by a drunken mob; that these men were permitted by the inspectors to vote without challenge, although their ineligibility must have been known; that a number of residents were supplied with orders on the poor fund just before election, under circumstances giving rise to a just suspicion that it was done to influence votes; and that the respondent peddled a

"blue ticket" which seems to have been given prominence during electioneering and must have been prepared for some purpose of identification. *Held*, that the trial court should have declared the election void.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action to test the title to the office of chairman of the board of supervisors of the town of Brule, Douglas county, Wisconsin. The election was held April 4, 1899. The official returns showed that defendant received 262 votes and relator 253. The complaint sets out a great many reasons why the election was illegal, in brief as follows: The election officers failed to put the proper questions to certain persons who were challenged. Men were permitted to vote who were not residents of the state or citizens of the United States. A large number voted who were not residents of the town, and some voted twice. The ticket prepared by the defendant was printed in blue ink. Voters were plied with whisky in the interest of defendant, and told to vote the blue ticket. Defendant made a corrupt agreement with one Colbrath, who was running a lumber camp, that the latter should bring in his men on election day and defendant should pay for their time; and men were kept after the logging season had ended, and taken to the polls, who were not voters. Financial help was promised certain residents of the town from the poor funds, as a means of procuring their assistance at the election for the defendant. Town orders were issued to certain claimants upon unfounded claims to induce them to favor the ring to which the defendant belonged.

A large amount of testimony was produced bearing upon the integrity of the election, and after the plaintiff had closed his case the defendant moved to dismiss the proceeding. The court took the matter under advisement, and finally made findings for defendant and directed a dismissal of the

complaint. The findings are to the effect that there were 515 votes cast, of which relator received 253 and defendant 262; that defendant was duly declared elected, and duly qualified for the office; that persons exceeding twenty-five in number voted, who were not residents of the town, five who were not residents of the state, and one who was not twenty-one years of age; that there was no proof for whom said persons voted; that said illegal votes were not procured to be cast or received by the defendant; that the officers of election acted in good faith; and that defendant was not guilty of fraud or bribery. The relator brings the case to this court for review on appeal.

For the appellant there was a brief by *A. B. Ross*, and oral argument by *Mr. Ross* and *Mr. B. W. Jones.*

For the respondent there was a brief by *C. R. Fridley* and *Thos. E. Lyons*, and oral argument by *Mr. Lyons.* To the point that evidence of statements of voters as to their qualifications to vote and how they voted, made to third parties after election, is inadmissible, they cited *Gilleland v. Schuyler*, 9 Kan. 569; *Beardstown v. Virginia*, 81 Ill. 541; *People ex rel. Dean v. Comm'rs of Grant Co.* 7 Colo. 190; *Patton v. Coates*, 41 Ark. 111; *Cessna v. Meyers*, Smith, Contested Elections in Cong. 60; *Newland v. Graham*, 1 Bart. Contested Elections in Cong. 5; *Att'y Gen. ex rel. Seavitt v. McQuade*, 94 Mich. 439; Cooley, Const. Lim. (6th ed.), 789–791; *People ex rel. Williams v. Cicott*, 16 Mich. 283; *Boyer v. Teague*, 106 N. C. 576; Payne, Elections, § 773; *Lauer v. Estes*, 120 Cal. 652; *French v. Lighty*, 9 Ind. 478; *Griffin v. Wall*, 32 Ala. 149.

BARDEEN, J. This case was decided upon the evidence offered by the relator, and the trial court found that he was not entitled to the relief sought. The certificate of the result of the election made by the inspectors was not *prima facie* evidence thereof. It was signed by but one of the in-

spectors. True, the name of another inspector appears thereon, but the evidence shows that it was written there by defendant, and no authority so to do was shown, even though it be admitted that such duty may be delegated. The inspector in question left the voting place before the certificate had been completed, and as he was about to go he turned to one of the other inspectors and said, "If there is anything in there for me to sign, you put my name to it." No request or direction was given defendant to sign his name. Hence it cannot be said that the certificate of the result of the election, signed by but one of the inspectors, is *prima facie* evidence of the facts therein stated.

Eliminating this certificate from our consideration, we have two claimants for office standing upon common ground. Both were seeking office, and both, as we shall see, used means to secure it that deserve the severest condemnation. It was conceded on the argument that the relator had not shown himself entitled to the office he claimed. He failed to show that he received a majority of the votes cast at the election, but he succeeded in showing a condition of affairs that taints the whole proceeding and calls for careful consideration. The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards. The case before us presents many vicious circumstances,—circumstances that indicate that the election was controlled and determined by men who had no semblance of right to vote, and who in turn were influenced and led by methods and means that ought to have no place in civilized society. There were cast at the election 515 votes. The proof fairly shows that there were not more than 275 to 300 legal voters in the town. At least two fifths of the votes cast were given by men who had no legal residence in the town, and who had no legal right to vote. The court

found that thirty-one of the votes cast were illegal. This conclusion was capable of absolute demonstration, but there was proof that a great many more were cast by men without the necessary qualifications. It is inconceivable how this fact could have escaped the notice of the officers of election. Sixty or more men were run in from one camp, the great majority of whom were shown not to have had a residence in the town, except for the temporary purpose of logging. On the way to the polls these men were met by others, who supplied them with what they called "*Conness* whisky," a commodity which seemed to be plentiful during the day. A short time prior to the election the defendant visited certain camps with a view of arranging to secure the votes of the men there located. The man in charge refused to allow him to go into the camps, but some arrangement was made by which the defendant was to pay a part or all of the expense of bringing them in. The defendant admits that *some* arrangement was made, but was not specific as to its terms. The fact remains that many of the men were paid for the time spent in going to vote, and were supplied with unlimited quantities of whisky. It is significant that Colbrath, the proprietor of the camps, was present at the polls and was an active partisan in the interest of defendant.

But there is another side to the picture. On the night preceding the election the relator visited the camps, and was received with greater hospitality than was accorded the defendant. He was permitted to communicate with the men, furnished them beer and cigars, and remained all night. Both of these men must have known that these men were not legal voters, and yet both were anxious to secure their votes and hoped they would get their share. This may account for the fact that no challenges were interposed when they came to vote. During the day whisky was so plentiful that one witness says there were at least 200 drunken men in the neighborhood of the polls. The relator admits having

furnished two bottles, besides giving money to one of his henchmen. Men working in the interest of defendant had ample supplies, and voters were invited to drink what they called "*Conness* whisky." It was so abundant and potent that it culminated in a stabbing affray in the vicinity of the polls. Another circumstance shown was that some half dozen or more able-bodied residents of the town were given orders on the poor fund just before election on recommendation of defendant or some one in his behalf. Some claim was made that town orders to voters were issued for road work with a prodigal hand, which were without merit, the inference suggested being that they were issued without proper scrutiny and to men active in the interests of defendant. The testimony on this branch of the case is, however, somewhat inconclusive.

It further appears that the tickets used by the defendant were printed in blue ink, and during the electioneering were referred to as the "blue ticket." There were six tickets in the field, and the only one with this peculiar color was the one used by the defendant. There can be but one possible explanation why this was done, and that is that it was for the purpose of furnishing the ignorant voter some means of identifying his ballot.

There are a number of other circumstances suggested in the brief of relator as bearing upon the conduct of the inspectors and the manner in which they made the count, and which it is claimed shows that the election was carried on in the interest of the defendant. In themselves they may not be sufficient to warrant a finding of absolute bad faith on the part of the election officers, yet they are sufficient to indicate that the election was conducted in a careless and slipshod manner, with scant regard to legal requirements. After the polls were closed, it was found that there were 515 names on the poll list, and only 513 votes in the box. Two votes were found folded together, which were taken

out and destroyed. The tally list shows 515 votes cast for the office of chairman, when there was in reality only 511 separate ballots. No one seems to be able to explain this discrepancy. This fact by itself would not avoid the election, but is mentioned as illustrative of the way the election was managed.

It is true, as the court found, the evidence fails to show for whom this vast number of illegal voters cast their votes. An attempt was made by the relator to offer testimony of admissions made by the voters as to their qualifications and for whom they voted. In each instance it was excluded by the court. We cannot say that such exclusion was error, because of the failure of the relator to make his offer sufficiently definite as to the time when such admissions were made, and as to the substance of such admissions. This court held, in *State ex rel. Hopkins v. Olin*, 23 Wis. 310, that when a witness refused to testify on the ground that his answers might tend to incriminate himself his admissions as to his qualifications and how he voted were proper to be shown. Testimony of this nature is admitted, contrary to the usual rules of evidence, perforce of circumstances, as being the best evidence obtainable. It goes in for what it is worth as tending to enlighten the court as to the situation, and is justified on the ground that its exclusion might defeat the ends of justice. No absolute rule as to its reception can be formulated. Much depends upon the circumstances of the case, as well as the circumstances of the admission. Care must always be taken in its reception lest some irresponsible voter, making admissions after a contest has arisen, be permitted to overturn an election by procurement or express design. As stated, the offers in this case were not sufficiently definite to make their exclusion error, yet they seem to emphasize the fact that very many of the votes cast were put in by voters who had no right to vote.

The defendant, not having a *prima facie* right to his office by virtue of his alleged certificate of election, was left in a position that would seem to call for some active effort on his part to support the integrity of the election. It was said in *State ex rel. Jones v. Oates*, 86 Wis. 634, that when one had been declared by the proper canvassing board to have been elected to an office, and had received the proper certificate, and had duly qualified, he had the *prima facie* right thereto. Sec. 804, Stats. 1898, provides that, after the canvass of the votes has been completed, and the result ascertained and determined by the inspectors, the clerk shall read to the meeting the names of the persons for whom votes for each office were given, and the number of votes given for each person, and the names of each person declared to be duly elected by the inspectors; and such reading shall be deemed sufficient notice to every person elected to any office at such meeting. There is no proof in this case that any such announcement was made, although one witness speaks of a final announcement as to the number of votes received by the relator. Assuming that the proper announcement was made, it is not necessary to determine whether that fact would give the defendant a *prima facie* right to his office or not.

We are faced with this situation: The court has found that thirty-one of the votes cast were illegal. It may be said with reasonable confidence that the votes cast exceeded the number of legal voters in the town by a number largely in excess of the number so found. We find both the relator and defendant conniving to secure for themselves the votes of a large number of nonresidents. We find the defendant entering into an arrangement with the foreman in charge of these men, which resulted in a large number being paid for the time spent in going to the polls. We find these men supplied with beer, cigars, and whisky to such an extent that hundreds became intoxicated, and the polls are surrounded

by a drunken mob. We find these men permitted to vote by the inspectors almost without challenge, although they must have known that many of them were ineligible. We find that a number of residents are supplied with orders on the poor fund just before election, under circumstances that give rise to just suspicion that it was done to influence votes. We find the defendant peddling a so-called "blue ticket," which seems to have been given prominence during the electioneering, and must have been prepared for some purpose of identification. All of these circumstances are vicious, and contrary to the spirit of our institutions. To permit such an election to stand requires us to shut our eyes to and excuse practices that ought always to receive the severest condemnation. When candidates for office connive at and election officers permit such wholesale illegal voting, the courts ought not to, and will not, hesitate to meet the conditions and furnish the proper relief. The circumstances of this case are so flagrant that we are compelled to disagree with the conclusions of the trial court. It being conceded that a large number of illegal votes were cast, it was his duty to adopt either one of the three following alternatives: (1) Declare the election void; (2) divide the illegal votes between the candidates in proportion to the whole vote of each; (3) deduct the illegal vote from the candidate having the highest vote. McCrary, Elections, § 497. Considering the circumstances surrounding the election as hereinbefore detailed, there was but one proper course to pursue. The relator had not shown himself entitled to the office. His conduct was little less reprehensible than that of the defendant. Hence the only proper alternative was to declare the election void. By so doing neither party is permitted to secure any advantage over the other, and the matter is relegated to the legal voters of the town, who ought to be permitted to exercise their rights, and make their choice of officers, without

being surrounded by influences so subversive of good government.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment declaring the election in question void.

BERGMAN, Respondent, vs. HENDRICKSON and another, Appellants.

March 21—April 6, 1900.

Liability of master for assault by servant: Court and jury: Scope of employment: Provocation: Jurors: Waiver of objection: Instructions to jury: Appeal.

1. In an action against saloon-keepers for an assault committed by their bartender upon plaintiff, an intoxicated customer who had refused to pay for drinks, the barkeeper testified that in the course of the colloquy the plaintiff threw his hands up across the bar and called the witness a vile epithet, and that he thereupon lost all thought or consideration of his masters' business or of collecting for the liquor, and committed the assault because of such motion and epithet. On a previous trial the same witness had testified that the assault was made because of the failure to pay for the drinks, making no mention of a personal grievance, and that his narrative was complete; and the testimony of one of the defendants, who was present, and of the plaintiff, tended to corroborate this latter version. *Held*, that the question whether the assault was personal, or was committed with the purpose or in the line of enforcing payment, was properly left to the jury.
2. If the bartender committed the assault for the purpose of collecting pay for his employers' liquor, he was acting within the scope of his employment, and his employers are liable, even though the servant may have been expressly prohibited from performing the duty in that manner.
3. In such a case the fact that the person assaulted conducted himself in an improper manner, calculated to arouse and bring on personal altercation with the bartender, and that the assault was wholly or

in part the result of such misbehavior, does not relieve the employers from liability, if the bartender was acting within the scope of his duties.

4. Refusal to discharge a juror on challenge for cause is not a prejudicial error, where the juror was removed on peremptory challenge, and no objection was made to the jury as finally impaneled.

5. Omission to instruct as to the burden of proof cannot be considered on appeal, when no request to supply such omission was made at the trial.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The plaintiff, intoxicated, entered defendants' saloon. After making two purchases of liquor for himself and others, for which he refused to pay, he finally made a third purchase from the barkeeper, one Backstrom. For this also he refused to pay when called on, and some altercation took place, whereupon the barkeeper struck him, and rushed out from behind the bar, and seized him, whereupon he fell to the ground, injuring his thumb seriously. He recovered a verdict, upon which judgment was rendered in plaintiff's favor, from which this appeal is taken. Other material facts are stated in the opinion.

For the appellants there was a brief by *Crownhart & Foley* and *J. A. Murphy*, and oral argument by *W. R. Foley*.

For the respondent the cause was submitted on the brief of *Geo. C. Cooper.*

DODGE, J. 1. The principal assignment of error upon which appellants dwell is that the evidence conclusively establishes that the assault by Backstrom upon the plaintiff was entirely personal to the former for the purpose of wreaking personal vengeance, or satisfying his personal anger and indignation, aroused by a threatening motion and an opprobrious epithet applied to him by the plaintiff. Backstrom testified upon the trial that the plaintiff, in the course of the colloquy, threw his hands up across the bar, in a manner in-

dicated by gestures, and called him by a vile epithet, and that he thereupon lost all thought or consideration of his masters' business, or of collection for the liquor sold, and committed the assault upon the plaintiff because of such motion and epithet. On a previous trial the same witness had testified, substantially, that the assault was made because the plaintiff did not pay for the drinks, and to compel him to do so; and gave a narrative of the events which wholly omitted both the threatening motion and the verbal abuse, asserting that his narrative was complete. The defendant who was present gave an account of the transaction, which indicated at least that the assault was the immediate sequence of the refusal to pay, without mentioning the circumstances which Backstrom related as arousing his personal ire. The plaintiff's own story, also, while quite indefinite, tended to the same effect. We are persuaded that the conclusion of the trial court that the testimony was open to two inferences — one that the assault was entirely personal, the other that it was done with the purpose and in the line of enforcing payment — ought not to be disturbed. The appearance of the witness Backstrom, the manner of his giving the new testimony on which the appellants now dwell and of responding to the cross-examination with reference to his previous testimony, might well have justified the jury in disbelieving the new facts testified to on the last trial, and we cannot feel justified in saying that the trial court erred in submitting to them the question of Backstrom's motive and purpose, nor in refusing to set aside their conclusion. If Backstrom committed the assault for the purpose of collecting payment for his masters' liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated,— nay, although it may have been expressly prohibited,— yet the master is liable for the damages caused

thereby, provided he has intrusted to the servant the duty he was attempting to perform. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Schaefer v. Osterbrink*, 67 Wis. 495; *Rogahn v. Moore M. & F. Co.* 79 Wis. 573; *Reinke v. Bentley*, 90 Wis. 457; *Bryan v. Adler*, 97 Wis. 124.

2. The appellants contend further that, although the bartender may have been acting within the scope of his duties, the master is not liable if the plaintiff, by words or acts, conducted himself in such improper manner as was calculated to arouse and bring on personal altercation with the bartender, and the assault complained of was wholly or in part the result of such misbehavior on the part of the plaintiff. The court refused a requested instruction to that effect, and, on the contrary, charged: "If Backstrom was impelled to the assault, whatever words may have passed, by a purpose to enforce payment of the liquor bill that he was trying to collect, and committed the assault as incidental to such effort, plaintiff should recover." The rule thus laid down by the court is that sanctioned by the authorities above cited; and the exception thereto, contended for by appellants, in case of misconduct or verbal provocation on the part of plaintiff, is nowhere recognized. Such an exception would ignore the principle on which the liability is founded, namely, that the tortious act of the servant, when within the scope of his duty, is the act of the master himself. That being the principle, the tort, when so committed by the servant, can be justified on no grounds less cogent than those which would serve as justification of the same act if committed by the master. In *Rogahn v. Moore M. & F. Co.* 79 Wis. 575, it is said: "It is generally agreed that for negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible." It need hardly be stated that neither insult nor vituperation can fully justify assault and battery, though they may properly mitigate damages

in civil actions or punishment in criminal prosecutions. Appellants press upon our attention, as supporting the exemption of the master in case of misconduct or insult by plaintiff to the servant, the case of *Scott v. C. P., N. & E. R. Co.* 53 Hun, 414, which, upon examination, proves to have no relevancy whatever. That case deals with a very different ground of liability, namely, that which is imposed on the master for wilful torts of a servant, although outside of the line of his duty, when the relations between the master and the plaintiff are such that the former is under an obligation to protect the latter against such wrongs, whether committed by servants or others. That liability is well stated and illustrated in *Craker v. C. & N. W. R. Co.* 36 Wis. 657, and *Fick v. C. & N. W. R. Co.* 68 Wis. 469, and is grounded not so much on the principle of *respondeat superior* as upon the failure of a carrier to perform its duty to protect its passengers and patrons. Such was the case urged on us by the appellants. There the driver of a street car assaulted a passenger to avenge insults and threats offered to him personally. His act was wholly personal and outside the scope of his employment. The plaintiff's right of recovery depended, not on the fact that the assault was committed by a servant, but on the fact that he suffered any assault while entitled to protection as a passenger. The rule of law declared in that case was responsive to the situation, and went no further than to hold that a passenger is entitled to protection only so long as his own conduct merits it, and that the carrier is not bound to protect him against the usual and probable results of his own misbehavior. If the soundness of that doctrine were fully conceded, it would not affect defendants' liability in the present case, predicated not on failure to protect, but upon defendants' own affirmative wrong, committed through their servant, acting in the line of his duty.

3. An error assigned to a refusal to discharge a juror on

challenge for cause cannot serve for reversal, since no prejudice resulted to appellants. The juror was removed on peremptory challenge, and no objection was made to the jury as finally impaneled. *Emery v. State*, 101 Wis. 627; *Cornell v. State*, 104 Wis. 527. The evidence, exclusion of which is assigned as error, was all within the discretion of the trial court. Either the questions were leading or mere repetitions. Omission to instruct as to burden of proof cannot be noticed on appeal when no request to supply such omission was made at the trial.

We discover no error.

By the Court.— Judgment affirmed.

HORTON, Respondent, vs. LEE, Appellant.

March 22 — April 6, 1900.

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Fraud: Conspiracy to induce exchange of lands: Evidence: Misrepresentations of value: Failure to examine.

1. That alleged confederates in a conspiracy to defraud one of his real estate by inducing him to exchange it for other property of little value were such in fact, may be established by circumstantial evidence.
2. The conduct of the owner of land worth $1,800 in trading it for land in a distant county, of comparatively little value, without any personal knowledge or attempt to gain personal knowledge thereof, is not reasonably explained by evidence tending to show that he was anxious to place his land beyond the reach of his sister who he feared would make some claim on account of it.
3. If property offered for sale or exchange be in a distant locality, and the vendee, to the vendor's knowledge, has no personal information in regard to it, and the latter misrepresents its value or quality for the purpose of inducing a trade and by artifice prevents the former from seeking information elsewhere or by a personal examination of the property, such misrepresentations are not mere expressions of opinion, but misrepresentations in respect to a material fact, satisfying the calls of actionable fraud in that regard.

4. Where by means of a fraudulent conspiracy in such a case the defrauded party had been thoroughly convinced that by trading he could turn his farm into money for much more than its real value, pretended indifference on the part of the owner of the distant land, and intimations that the former should examine it before making the trade, are not evidentiary of fair dealing and freedom from fraudulent purpose on the part of the latter.

APPEAL from a judgment of the circuit court for Jefferson county: B. F DUNWIDDIE, Circuit Judge. *Affirmed.*

Action to avoid a deed for fraud. The issues raised by the pleadings are indicated in findings and conclusions, in substance as follows:

Plaintiff, when the transactions occurred leading up to and inclusive of the particular act in controversy, was a weak-minded man about fifty years of age to the knowledge of defendant, who had been on intimate terms with him for many years. August 27, 1898, plaintiff owned land in Dane county, Wisconsin, of the value of about $1,800, and defendant owned land in Adams county, Wisconsin, obtained about one year before at a cost of about $17 and worth not to exceed $400. In the spring of 1898 plaintiff, at defendant's request, accompanied him to Madison, Wisconsin, and on the way described his Adams county land as suitable for a good farm, stating that he had refused $3,000 for it. On arriving at Madison defendant went to a saloon, ostensibly to see a Miss Jones to inquire about her brother, inducing plaintiff to accompany him. Defendant took the plaintiff, by a side door of the saloon building, into a sitting room where a woman was found and introduced by defendant to plaintiff as Miss Jones. Plaintiff had never seen the woman before. Soon after the introduction defendant went away, promising to return soon. Upon plaintiff and Miss Jones being left alone, she began to talk about defendant's Adams county land, stating, among other things, that a railroad was going to be built through it, that a station would be located thereon,

that her brother, a railway superintendent, wanted to obtain the land, knowing of its prospective value, and that if plaintiff would purchase it for her and her brother for $3,000 she would pay him $50 for his services, and suggested that he obtain the land by trading his Dane county land for it.

Thereafter defendant again caused plaintiff to accompany him to see Miss Jones, when she urged plaintiff anew to trade his Dane county land for the Adams county land, saying she and her brother would give $3,500 for the latter if plaintiff would obtain it for them. Subsequent to plaintiff's first meeting with Miss Jones she wrote him five letters, urging him to obtain defendant's land for her and her brother, and offering to take it off his hands as indicated. Some of the letters purported to have been written at Room 3, Capital House, Madison, at which place and time there was no person by the name of Miss Jones. One letter was mailed at defendant's post-office address. During the period mentioned a man pretending to be the brother of Miss Jones visited plaintiff and urged him to obtain defendant's Adams county land, holding out inducements like those presented by his so-called sister.

By the influences on plaintiff indicated, the said statements made to him being relied upon as true, he was induced to trade and convey his land and twenty-five bushels of rye to defendant for the Adams county land. The statements made as aforesaid to induce plaintiff to trade his land to defendant were false, fraudulent, and a part of a fraudulent scheme entered upon and carried out by defendant, by the aid of the so-called Miss Jones and her so-called brother, all acting in concert by defendant's procurement, for the purpose of defrauding plaintiff out of his land by obtaining it for the Adams county land. Plaintiff did not discover or appreciate the fraud perpetrated upon him by defendant, by aid of his said confederates, till shortly before the commencement of this action. Plaintiff is entitled to

judgment annulling his deed of the Dane county land, upon condition of his reconveying to defendant the Adams county land and paying into court, for the latter's benefit, his expenditures for taxes on the Dane county land, with interest thereon from December 28, 1898.

In accordance with the foregoing, judgment was rendered for plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Clancey, Loverud & Gilman*, and oral argument by *J. M. Clancey*.

Rufus B. Smith, for the respondent.

MARSHALL, J. The findings of fact cannot be disturbed under the familiar rule governing the review, on appeal, of cases tried without a jury. It is useless to incumber the records here by a discussion of the evidence which leads to that conclusion, and which, to our minds, tends strongly to prove the existence of every material fact necessary to support the judgment.

True, on the vital question of whether the alleged confederates of defendant were such in fact there is no direct evidence, but that is not material. Fraud is generally worked by secret ways so as to prevent the existence of direct evidence of it if possible. It would often succeed where failure happens if it were not for the salutary principle that facts may as well be established by circumstantial as by direct evidence. Where circumstances are satisfactorily proved, pointing so strongly to the existence of an act essential to actionable fraud as to warrant the conclusion that it clearly characterized the transaction challenged, such act stands proved for the purpose of the controversy, though there may not be a particle of direct evidence in regard to it.

It is confidently contended by appellant's counsel that respondent's conduct in trading off his Dane county land, worth $1,800, for land in a distant county, of comparatively little value, without any personal knowledge or attempt to

gain any personal knowledge thereof, is explained by evidence tending to show that he was anxious to place the Dane county land beyond the reach of his sister who he feared would make some claim on account of it. That can hardly be said to be a reasonable explanation of respondent's actions. It might stand as an explanation of his desire to dispose of the Dane county land, but not of his willingness to practically give it away. If he wanted to place the land beyond the reach of his sister, it would be unreasonable to say that he was willing to do that regardless of obtaining an equivalent for it.

The circumstance referred to does not furnish any explanation for the failure of respondent to visit the Adams county land to find out whether it was a fair equivalent for the Dane county land,—none whatever. There is no reasonable theory disclosed by the evidence to explain that failure, except that respondent was weak-minded and utterly incompetent to do business, or he was made to believe, by appellant and his confederates, that the Adams county land was valuable for a farm, and specially valuable to an extent much in excess of the Dane county land because it was in the pathway of a located railway about to be constructed, that parties actually stood ready to take it for over $3,500, and that appellant and such confederates purposely imposed upon respondent to prevent his personally examining the land, and accomplished such purpose, and in that way consummated the fraud alleged. That theory was adopted by the trial court, and certainly there is no clear preponderance of the evidence against such theory.

But it is said that, conceding the findings of fact to be correct, they disclose at most a mere false opinion as to the value of the Adams county land, a promise to do something in the future without any intention to redeem the promise, and representations as to other future matters, and that such misrepresentations, if they can be called such, were not of

material facts, and therefore will not void a sale induced thereby on the ground of fraud.

True, generally speaking, a mere opinion as to the value of property offered for sale, however extravagant, will not void the sale, if one be thereby made, on the ground of fraud. *Maltby v. Austin*, 65 Wis. 527; *Fowler v. McCann*, 86 Wis. 427. Neither will a false representation as to future matters, or a promise to do some act in the future which the promisor does not intend to perform. *Patterson v. Wright*, 64 Wis. 289. The rule as to representations of value applies strictly only where the parties are dealing at arm's length and on equal terms. It does not apply where the relations between them are of a fiduciary character or of trust and confidence, or the person to whom the representations are made is incompetent to do business or knows personally nothing about the subject of the sale and is purposely induced, by the conduct of the vendor, not to inform himself but to act under the advice of such vendor and the influences by him used to that end.

While there is some conflict, by the great weight of authority the law is, as laid down by the text writers and the courts, that if property, offered for sale or exchange, be in a distant locality, and the vendee, to the vendor's knowledge, has no personal information in regard to it, and the latter misrepresents its value or quality for the purpose of inducing a trade and by artifice prevents the former from seeking information elsewhere or by a personal examination of the property, such misrepresentations are not mere expressions of opinion, but misrepresentations in regard to a material fact, satisfying the calls of actionable fraud in that regard. Many cases might be cited to that doctrine, in many of which the facts are similar to those disclosed in this case in all essential particulars. The following are but a few of such cases: *Witherwax v. Riddle*, 121 Ill. 140; *Harris v. McMurray*, 23 Ind. 9; *Cressler v. Rees*, 27 Neb. 515; *McKnight*

v. Thompson, 39 Neb. 752; *Simar v. Canaday*, 53 N. Y. 298; *Saunders v. Hatterman*, 2 Ired. Law, 32; *Henderson v. Henshall*, 54 Fed. Rep. 320; *Chrysler v. Canaday*, 90 N. Y. 272; 1 Bigelow, Fraud, 496.

In *McKnight v. Thompson, supra*, the defendant represented the value of three city lots located in the city of Topeka, Kansas, owned and offered by him for sale to the plaintiff, to be $1,000. Plaintiff lived a considerable distance from the property, and to defendant's knowledge did not possess any information whatever of their value except what was directly and indirectly furnished by him. Defendant, in order to confirm his statements as to the value of the property, caused a letter, written by the cashier of the First National Bank of Topeka to a person supposed to be in no way connected with defendant, stating that in his judgment the property was worth from $150 to $200 per lot, to be so changed as to indicate that the writer's judgment was that the lots were worth from $350 to $400 per lot, and as so changed delivered to plaintiff, whereby he was induced to deal with defendant without making a personal investigation regarding the value of the property. The wrong was held to be actionable on the ground of fraud, the court saying that, while it is "undoubtedly the rule, where the buyer is acquainted with the property and its value, or where he has negligently omitted to make inquiries for the purpose of ascertaining the real condition of the property," that the maxim *caveat emptor* applies, "the rule, however, is otherwise where the purchaser resides at considerable distance from the location of the property which is the subject of the negotiations and is prevented from examining it or from making inquiries as to its value and condition by the fraud of the seller. In such case a false assertion concerning value will not be regarded as a mere expression of opinion, but will be treated as an affirmation of fact."

To the same effect is *Witherwax v. Riddle, supra*, where the circumstances were strikingly like those under consideration. It involved an exchange of lands owned by the plaintiff in Whiteside county, Illinois, with which both parties were acquainted, for lands owned by the defendant in Adams county, Wisconsin, the quality and value of which was known to the defendant but entirely unknown to the plaintiff, of whose ignorance in that regard the defendant well knew. Both parties, at the time of the trade, resided in Chicago. The defendant previously resided in Whiteside county. Defendant stated to plaintiff that the Adams county land was worth $10 per acre. Plaintiff, wishing to avoid the expense of a trip to see the land, asked the defendant to refer him to some one who could corroborate the defendant's judgment as to the value. Thereupon defendant caused plaintiff to go with him to a hotel in Chicago and there introduced him to a Mr. Lowe who pretended to know generally about the land and said it was worth from $8 to $10 per acre in its natural state and $25 per acre improved. Plaintiff not being satisfied, defendant caused a Mr. Duffield to corroborate Lowe and to tell the plaintiff, among other things, that the land was better than the Whiteside county land. That did the work, and the trade was consummated. The land in Adams county turned out to be comparatively worthless. Duffield knew nothing about the land, in fact, and was a disreputable character, used by the defendant to impose upon and mislead the plaintiff. The court held that the defendant was guilty of actionable fraud; that he was responsible for every step in the scheme resorted to to ensnare the plaintiff and induce him to part with his property in Whiteside county for the Adams county land without any personal investigation of the value of what he was getting. The facts, it will be noted, fit the instant case almost as well as if they had been used for a model by appellant, omitting the element of openly referring the vendee to the confeder-

ates for information. The turning point, in the cited case, was that the vendor fraudulently prevented the vendee from obtaining information regarding the Adams county land outside of that furnished by him and those working in his interest.

To the same effect is *Henderson v. Henshall*, 54 Fed. Rep. 320. There a third party, ostensibly acting independent of the vendor, was introduced to the vendee to make false representations as to the value of the property.

Further reference to authorities is not necessary to show that this case does not come within the general rule relied upon by appellant's counsel, that false statements of value, which should be treated as mere matter of opinion made by a vendor in the course of negotiations for the sale of his property, will not satisfy the call for misrepresentations as to a material fact essential to actionable fraud. While the rule is well established that misrepresentations of the value of property in the circumstances indicated, however false and whatever be the intent of the vendor in making them, if there be no other wrongful element in the transaction consummated thereby, to the damage of the vendee, do not constitute actionable fraud, yet, if the vendee, to the knowledge of the vendor, is unacquainted with the subject of the sale and it is located in a distant section of the country, and by some artifice or trick on the part of the vendor the vendee is induced to purchase the property relying solely on the truth of the vendor's statement and the representations of others, acting in his interests and by his procurement, in regard to the value of the property, and such representations are false and result in damage to the vendee, the vendor is guilty of actionable fraud. Statements as to value, made under such circumstances, cannot be regarded as mere opinions which the vendee, as a man of reasonable prudence, cannot act upon except at his peril. They are statements of

material facts which the vendor, in good morals as well as in law and equity, is bound to make good to the person who has been victimized thereby.

The foregoing rules this case in favor of the respondent, even if the element were out of it that he is a weak-minded man and incompetent to do ordinary business, to the knowledge of the defendant. On the facts found, appellant laid a trap and used the pretended Miss Jones and her so-called brother to lure the respondent into it. The idea was first given to respondent by appellant, ostensibly in neighborly confidence, that the Adams county land was worth $3,000, could be sold for that, and was suitable for a valuable farm. Having planted that seed in respondent's mind, appellant caused it to be industriously cultivated by his confederates while he remained in the background, till respondent was thoroughly convinced that the Adams county land was worth much more than his Dane county land, and that by trading the latter for the former he could turn his land into money at much more than its real value. At that stage of operations, while respondent was firmly held and prevented from visiting the Adams county land, or investigating as to its value outside of the region of appellant's influence, by the web adroitly and secretly woven about him, appellant pretended to listen with indifference to respondent's suggestions of a trade of the Dane county land for the Adams county land, intimating that the respondent should examine the latter before making such a trade. Appellant's conduct at this point, instead of being evidentiary of fair dealing on his part and freedom from a fraudulent purpose, shows that it was shrewdly calculated to be the best possible way of consummating the fraudulent scheme before respondent could discover the manner in which he had been imposed upon. The suggestion to respondent to visit the land after he had been educated to believe he could safely trade for it

without any investigation, was an exact repetition of a circumstance that characterized the case of *Witherwax v. Riddle*, 121 Ill. 140.

The law is clear on the facts found by the trial court, which we hold must stand as verities in the case, that the judgment of the court declaring the deed obtained by the appellant void was right and must be affirmed.

By the Court.— So ordered.

THE J. THOMPSON MANUFACTURING COMPANY, Appellant, vs. GUNDERSON, Respondent.

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March 22 — April 6, 1900.

Contracts: Manufacture of machines according to model: Acceptance: Waiver of defects: Implied warranties: Worthlessness: Burden of proof: Measure of damages.

1. If machines manufactured under a contract according to a model furnished by the vendee are sent out to dealers in a defective condition with the knowledge and consent of the vendee, he cannot hold the manufacturer responsible in damages for their failure to work; and if the vendee takes them and, with full opportunity for examination and knowledge of the variance between the machines contracted for and the ones furnished, fails to give the manufacturer timely notice that he does not accept them as being in compliance with the contract, the defects will be deemed waived.
2. Under a contract providing for the manufacture of a certain number of tobacco transplanting machines according to a model, except that the shoes were to be of steel instead of cast iron, and containing a stipulation that the manufacturer did not guarantee them to work and that the vendee assumed the risk, no implied warranty arose that the steel to be used for the shoes and gatherers should "scour in the soils of this country." The law merely implied an obligation that the manufacturer should use reasonable care in the selection of materials, and that, so far as its efforts entered into the manufacture of the materials, there should be no

latent defect in either materials or workmanship. Remarks in *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, limited.

3. If the vendee retained the machines without any offer to return them he assumed the burden of showing that they were worthless; and the manufacturer could recover their actual value, notwithstanding they were totally unfit for the use for which they were made, less such special damages as the vendee had properly pleaded and proved.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This action is brought to recover on a written contract for the manufacturing of fifty tobacco transplanting machines in the year 1892, at $40 each, and on a verbal contract for remodeling the same machines in 1893, at $5 each. Credit was allowed for $891.12, and judgment was demanded for $1,358.88 and interest. The issue tendered was that only thirty-nine of the fifty machines were made, and they were not made according to the contract, by reason whereof they would not work properly and defendant lost the sale of the same. By way of counterclaim, defendant set up that a part of said machine known as "gatherers" was not made according to the model of hard plow steel, would not scour, and the machine would not work properly, whereby said machines were a total loss to the defendant.

On the trial, evidence was offered that the steel shoes of the machines were not made of the proper kind of steel and would not scour, and the defendant was permitted to amend his answer at the close of the testimony to cover this alleged defect. The court submitted the question of the defects mentioned to the jury, with instructions that if they found such defects existed they might find a verdict for defendant for the amount he had paid to plaintiff, together with the profits defendant might have made on the fifty machines. The jury brought in a verdict for defendant for $889, from which the court required the defendant to remit $20 as a condition of denying a motion for a new trial on the ground

of newly discovered evidence. Judgment was entered for defendant, from which the plaintiff has taken this appeal.

J. B. Dow, *William Smith*, and *A. A. Jackson*, for the appellant.

E. D. McGowan, for the respondent.

BARDEEN, J. The facts in this case are involved in a great deal of doubt and uncertainty. Indeed, the confusion is so great that the labors of the court have been greatly increased in endeavoring to arrive at the ultimate rights of the parties. The contract regarding which the main controversy has arisen is as follows:

"Beloit, Wis., May 18th, 1892.

"*G. S. Gunderson, Beloit, Wis.:* We will make and furnish and complete fifty tobacco transp. machines, built like your model planter, except we will furnish steel shoes instead of cast-iron, for the sum of forty dollars ($40.00) each. We are not to guaranty working of machines. You assume all risk, and will sell, set up, and start all machines, and get settlement for same. You to pay us six hundred dollars ($600.00) cash now, and the balance to be settled by cash or good notes within ninety days. Respectfully,

"J. THOMPSON & SONS MFG. CO.

"Accepted. G. S. GUNDERSON."

Under this contract the plaintiff claims to have manufactured fifty machines, thirty-nine of which were delivered, and the remainder were held in the shop subject to defendant's order. It appears that the defendant was the inventor of the machine. It had been tested to a limited extent during the years prior to 1892 by a crude model made under defendant's directions. In the early part of 1892 defendant caused a complete model to be made, which was the one taken to plaintiff's shops, and was the one referred to in the contract. This model had a cast-iron instead of a steel shoe. Whether the gatherers, concerning which a great deal of

controversy has arisen, were attached to the model, or were simply delivered at the shops, is a matter of very much doubt. It is practically agreed, however, that the machines sent out in 1892 had no gatherers upon them, and that the defendant set up and attempted to operate his machines without them. These gatherers were made of a narrow strip of steel, polished on one side, and designed to run in the ground and press the earth up to the plant after it had been set. In order for them to do good work it was necessary that they scour. Their cost was about fifty cents for each machine.

It will be observed that the contract calls for a steel instead of a cast-iron shoe. The evidence shows that a large number of these machines (just how many no one can tell from the evidence) were sent out with cast-iron shoes,—whether with defendant's consent and approval, or not, the evidence is equally uncertain. These facts, however, do appear: Prior to the date of the contract, plaintiff had manufactured a number of these machines,—just how many, no one appears to know. On May 14th one of the machines was sent to Spaulding, at Broadhead, and another to Wagley, at Orfordsville. On May 21st another was shipped to Perrigo, and on the 25th one to Foltz, at Clinton Junction,—each with a cast-iron shoe and without gatherers. On June 10th twenty more were sent to Spaulding. The defendant saw this consignment and knew that they had no gatherers and had the cast shoe. It is reasonably certain that the first four machines sent out had been made before the contract was drawn. It is equally certain that they were considered and treated as machines made under the contract. No one seems to be able to explain why the machines sent to Spaulding on June 10th had the cast-iron instead of the steel shoe, or why gatherers were not sent. The defendant knew of these facts before they were sent, and went out and set up and attempted to operate the machines,

without the least objection. The machines worked unsatisfactorily At defendant's request, steel shoes were sent out, but for how many machines the evidence fails to give any light. The steel shoes failed to work because they would not scour. Only one of the machines sent out worked satisfactorily, and this was paid for. At some time before the opening of the season of 1893 the defendant bargained with plaintiff to remodel these machines according to his directions, for which he agreed to pay $5 each. Changes were made, but in how many no one seems to know. The machine was again tested in 1893, and failed to work because the shoes and gatherers would not scour.

The defendant claims that, if the machines had been made according to the contract, he could have sold the entire lot the first season and realized a handsome profit on each one. The case was submitted to the jury on that basis, with the added qualification, stated in the charge of the court, that the law implied a further condition to the contract,— that the steel to be used in shoes and gatherers should be of such quality as would scour in the soils of this country, and if they did not meet this requirement it was not a compliance with the contract.

We do not think the case was fairly submitted to the jury. In the first place, if the machines sent out the first year with the cast-iron shoes and without gatherers were sent with the knowledge and consent of defendant, he cannot hold the plaintiff responsible in damages for their failure to work. Or if, with full opportunity for examination and knowledge on his part of the variance between the machines contracted for and the ones furnished, he took them and failed to give the plaintiff timely notice that he did not accept them as being in compliance with the contract, the defects will be deemed waived. Such is the law of this state. *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *McClure v. Jefferson*, 85 Wis. 208. The

fact that the machines were to be made like the model furnished does not alter the rule, so long as the defects complained of are obvious and conspicuous, as they were in this case. There was evidence in the case from which the jury might have inferred that the cast-iron shoes were put on by defendant's consent, and that he likewise acquiesced in sending out the machines without the gatherers. The evidence as to notice given defendant is vague and indefinite, and somewhat in dispute. Under the charge of the court, no such fact was presented to the jury; and, being fairly in the case, it was error not to so submit it. The jury might well have found a waiver of the exact conditions of the contract, under the circumstances in proof.

An important question arises as to the true construction to be given to the contract in suit. The defendant seeks to apply the rule that when a manufacturer contracts to supply an article which he produces, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the purpose for which it is to be applied. This is the rule adopted by the court when he instructed the jury that the law implied an obligation on the part of plaintiff to use a quality of steel that would scour in the soils of this country. No such engagement appears on the face of the contract. The contract is to make a given number of machines according to the model, except that the shoes were to be steel instead of cast-iron. It is nothing more nor less than an executory contract to manufacture goods. The obligation imposed by the law, as stated by some of the authorities, is that the machines shall be free from any latent defect growing out of the process of manufacture. *Durbrow & H. Mfg. Co. v. Cuming*, 35 App. Div. 376; *Cosgrove v. Bennett*, 32 Minn. 371; *Goulds v. Brophy*, 42 Minn. 109: *Carleton v Lombard, A. & Co.* 149 N. Y. 137; *Hoe v. Sanborn*, 21 N. Y 552.

Durbrow & H. Mfg. Co. v. Cuming was a case where the plaintiff contracted to make 100 machines for sewing in sweat bands, in accordance with a model. The defense was that the machines did not work properly. The court say: "The rule is well established that, in cases of executory contracts for the manufacture and sale of goods of a particular description, there is an implied warranty that they are free from any latent defect growing out of the process of manufacture, and that this is the sole warranty that attaches to such a contract. But when there are defects in the goods which could be discovered upon inspection, and the vendee neither returns nor offers to return the property, nor gives to the vendor notice or opportunity to take it back, in absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced, and may not therefore complain of inferior quality,"—citing *Studer v. Bleistein*, 115 N. Y. 316; *Coplay I. Co. v. Pope*, 108 N. Y. 232.

We obtain the following from *Cosgrove v. Bennett, supra:* "The defendant insists that a warranty is, under the circumstances, to be implied, that the mill ordered should be reasonably fit for the business for which it was intended. To this we do not agree. . . . . The general rule is stated to be that, when an article is ordered to be manufactured for a particular use or purpose, there is an implied warranty that it is to be reasonably fit for such use or purpose. But when, as in this case, the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied, further than it should be of good workmanship and material."

Along the same line is the case of *Gachet v. Warren*, 72 Ala. 288, in which Chief Justice BRICKELL used the following language: "But if a manufacturer or dealer contracts to sell a known and described thing, although he may know

the purchaser intends it for a specific use, if he delivers the thing sold there is no implied warranty that it will answer or is suitable for the specific use to which the purchaser intends applying it." Another case very frequently cited is *Whitmore v. South Boston I. Co.* 2 Allen, 52, and which fully sustains the general doctrine. In *Mason v. Chappell*, 15 Grat. 572, it is said that where a specific article is ordered and furnished, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for that purpose; and he will not, in absence of fraud or an express warranty, be held liable, however unfit and defective it may turn out to be.

In further support of this same rule is *Wis. R. P. B. Co. v. Hood*, 54 Minn. 543, which says: "If an order be given for a specific article, of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so." The ground upon which the seller or manufacturer is held liable on the warranty is whether the *purpose*, and not the specified article, is the essential matter of the contract. A copious note covering the question of implied warranty on sales of personal property may be found appended to the case of *McQuaid v. Ross* (85 Wis. 492) in 22 L. R. A. 187.

A case bearing a close parallel to the one at bar is *Schoenberger v. McEwen*, 15 Ill. App. 496; the holding being that where one orders an article of a manufacturer, and designates a particular kind of material out of which the article is to be made in whole or in part, such material not being made by the manufacturer himself, if he uses the designated material the law does not imply a warranty as to its quality or fitness, unless it be shown that the manufacturer failed to use reasonable and ordinary care in selecting it. In *Cunningham v. Hall*, 4 Allen, 268, the contract was for the con-

struction of a vessel, in which it was agreed that it should be covered with pine plank; the builder to see "that she is just right in all respects." It was held that the latter agreement was qualified by the former, and that the purchaser assumed the risk of defects which were naturally incident to pine plank and not known to the builder and could not have been discovered by him by the exercise of reasonable care and skill. And in such case there is no implied warranty which will cover the defect.

Reference has been made to the authorities in other states to show how deeply the rules thus stated are intrenched in the jurisprudence of this country. Following this line of authorities, this court held in *Milwaukee B. Co. v. Duncan*, 87 Wis. 120, that when a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the thing described be actually supplied, there is no warranty that it should answer the particular purpose intended by the buyer; and if the article is sold by a formal written contract, which is silent on the subject of warranty, no warranty can be ingrafted or added to the written contract. There is some language in the opinion in *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, which is supposed to encroach upon this rule. In that case the evidence tended to show that the wheels in controversy ought to have been made of refined iron. There was a stipulation against the use of defective material, and the court said, in effect, that this stipulation meant that material not suited for the purpose should not be used, and that it was no compliance with the contract to use a kind of iron unfit to be used in the manufacture of such wheels. Stress was laid upon the stipulation against the use of defective material, and it was said that this was "substantially an agreement that material not suitable to the purpose should not be used, and required that the iron for the spokes should be of the necessary grade and

quality, if there was any such procurable in the market." If this is to be construed to mean that refined iron should have been used, and that such was the implied agreement, the case goes beyond any to be found in the books. If, however, the meaning intended was that the manufacturer was bound to use reasonable care in the selection of material for the wheels, and that he ought not to have used a kind of iron notoriously unfit for the purpose intended, it can easily be reconciled with the cases cited. Any broader construction than the one last suggested ought not to be sustained. This result is reached by a construction of the contract itself, and not by the interpolation of implied covenants.

Applying the principles of law hereinbefore stated to the case before us, we are satisfied that no implied warranty arose, from the contract in suit, that the steel to be used for the manufacture of the shoes and gatherers should "scour in the soils of this country." The law implied an obligation that plaintiff should use reasonable care in the selection of the materials, and that, in so far as the plaintiff's efforts entered into the manufacture of the materials, there should be no latent defects in either materials or workmanship. The proof is undisputed that plaintiff used open-hearth steel for the shoes and gatherers,—a kind of steel in common use, and a kind the plaintiff had used for many years in the manufacture of a corn planter which it had been selling, and which had worked successfully. The instruction given the jury by the court furnished no proper test of the plaintiff's liability.

The court further instructed the jury that, if they found for the defendant, he might recover the profits he would have made on the entire lot of machines. This was error, because one of the machines, at least, had been accepted and paid for.

The court also proceeded upon the assumption that the machines were entirely worthless. The defendant testified that they were perfect in every respect, except as to the shoes

and gatherers. The evidence does not show what it would have cost to have obtained new shoes or gatherers, but it is perfectly evident therefrom that the cost would not have exceeded $5 or $6 for each machine. These portions could easily have been duplicated, and the entire machine could have been utilized. Moreover, none of the machines was returned to plaintiff. The evidence fails to disclose any basis upon which we can compute their value, but they were certainly worth *something*. The rule is that if the vendee retains the property, without any offer to return, he takes upon himself the burden of showing that the property purchased is entirely worthless, not only for the purpose for which it was purchased, but for every purpose. In such case the vendor may recover the real value of the chattel, if any, notwithstanding its total unfitness for the use for which it was purchased. *Warder v. Fisher*, 48 Wis. 338. In such case the measure of damages would be the difference between the contract price and the actual value, and, if the case should show special damages, the vendee would also be entitled to recoup or recover such as he had properly alleged and proven.

Upon any proper theory of the case, the rule of recovery given by the court was erroneous.

Many other questions have been raised and discussed, but sufficient has been said to cover the main issues in the case and furnish a proper guide upon another trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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KOESTER, Administrator, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 22 — April 6, 1900.

Railroads: Collision at street crossing: Contributory negligence: Failure to look: Diversion of attention: Court and jury.

1. Plaintiff's intestate was struck and killed at a street crossing by a passenger train running at an unlawful speed without the statutory signals being given. Upon the evidence — showing, among other things, that the deceased was driving rapidly and as he neared the crossing, with which he was familiar, was urging his horse forward; that although his view down the track was considerably obstructed as he approached, yet from certain points the train must have been in plain sight had he looked; and that as he reached the right of way, fifty feet from the point of collision, a mere glance would have disclosed to him his peril — it is *held*, as matter of law, that he was guilty of contributory negligence either in failing to look or in attempting to cross in front of the train with knowledge of its approach.
2. An engine and caboose which, shortly before the accident, the deceased might have seen starting from the station in the direction whence the train afterwards came, and which had passed down a side-track over the crossing in question and stopped in plain view for a considerable distance as he approached the tracks, is *held* not to have constituted such a diversion of his attention or such an assurance that no train was coming from that direction as would make the question of his negligence one for the jury.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

The defendant's railway runs through the city of West Bend in a generally northerly and southerly direction. The city is mainly some little distance to the west of the track, while to the east of it, in the vicinity involved, are some lumber yards and sheds and an elevator. The railroad is crossed by Water street at a point about 600 feet south of the depot and about 850 feet north of the south city limits. The course of the railroad is level, and at or above the surface,

for nearly half a mile south of the depot, so that, but for the obstructions hereafter to be mentioned, a train thereon would be obvious. Eleven hundred and fifty feet south of Water street the track crosses a bridge. The plaintiff's intestate left an elevator situated east of the railroad and about 400 feet north of Water street, drove in a buggy rapidly south on a traveled way to Water street, and turned thereon at a point about ninety feet east of defendant's main track, and traveled westward along Water street, crossing two switch tracks and then the main track. When the hind wheels of his buggy were on the main track he was struck by a regular passenger train traveling, as the jury found, about twenty-three miles per hour, and was killed. Deceased drove rapidly, increasing his speed as he approached the crossing, where, as the jury found, he was traveling eight miles per hour, whereas shortly before his rate is fixed by them at seven miles per hour. He made no pause from the elevator to the time of his collision.

On the south side of Water street, commencing at the railroad right of way about fifty feet east of the main track, is a lumber shed, which runs southwesterly parallel to a switch track. Then intervenes a space of about twenty-six feet, and a building standing practically due north and south, the north end of which, on Water street, is occupied as an office and the rear portion as a lumber shed. East of this are lumber yards and buildings, with intervals between them. The testimony shows that for some considerable distance after leaving the elevator the track was visible from a point some 700 or 800 feet south of Water street to nearly half a mile south of the depot. The place of turning westward on Water street is approximately opposite the west line of the office building above mentioned, between which and the lumber shed direct lines of vision would give a view of the track at a point about 280 feet south of the crossing and thence on southward. That space was, how-

ever, incumbered by certain piles of posts, the highest of which was estimated at about eight feet, over which the deceased could easily have seen by rising in his buggy. A photograph, taken at a time when the highest of these piles had been elevated somewhat, shows that, at an elevation of three and one-half or four feet from the ground, considerable portions of the track were visible around the highest pile, which did not occupy the entire space. After passing this space and reaching a point opposite the northwest corner of the lumber shed, approximately fifty feet east of the place of injury, the view of the track southward is unobstructed from the crossing to a point about 300 feet south thereof, which distance, however, of course enlarges rapidly as the traveler advances and his line of vision forms an acute angle with the line of the lumber shed. At the time of the injury, however, upon a side track substantially parallel with the main track, and distant about five feet east therefrom, there stood an engine and caboose, about ninety feet in length, the north end of which was about twenty or thirty feet south of the crossing on Water street. This would have obscured the track from the last-mentioned point of observation for a space of about 160 feet south from the crossing, leaving only about 140 feet of the main track momentarily visible upon reaching the west line of the lumber shed. The train was about 340 feet in length.

As to the conduct of the deceased in the way of observation or effort to observe, there is no evidence, except that he did not stop to look or listen. He was a farmer, living about three miles from the city for many years, during which the train in question had been due at substantially the same time. He was in the habit of frequently passing this crossing on Water street, as shown by the testimony of the occupant of the lumber office in question. His visits to the elevator were every week or two. The testimony, with the exception of some undisputed evidence relating to measure-

ments and photographs, was entirely from plaintiff's witnesses.

At the close of the trial direction of a verdict was requested by defendant and refused, and a special verdict was taken which, so far as material on this appeal, was as follows: "(2) At what rate of speed was defendant's train moving at the time of collision? A. Twenty-three miles per hour. (3) At what rate of speed was Henry Kruse, deceased, driving as he entered upon defendant's right of way? A. Seven miles per hour. (4) At what rate of speed was Henry Kruse, deceased, driving at the time of the collision which resulted in his death? A. Eight miles per hour. (5) As Henry Kruse, deceased, was approaching the crossing of defendant, could he have heard the noise of the approaching train if he had listened, by the exercise of ordinary care? A. No. (6) Could Henry Kruse, deceased, have seen the approaching train if he had stopped as he entered upon defendant's right of way, and listened? A. No. (7) Did Henry Kruse, deceased, stop and look out for the approaching train of defendant? A. No. (10) Was Henry Kruse, deceased, guilty of a slight want of ordinary care and prudence which caused or contributed directly to his death. A. No."

Defendant moved the court to set aside the answers to the fifth, sixth, and tenth questions, and for judgment for the defendant, on the ground that they were adverse to the undisputed evidence, and also moved for a new trial on the same with other grounds. Both motions being overruled, judgment was entered for the plaintiff, from which this appeal is brought.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish*.

C. H. Hamilton, for the respondent, to the point that in cases where the circumstances were less perplexing than in

the case at bar this court has repeatedly held that the question of contributory negligence was for the jury, cited *Roberts v. C. & N. W R. Co.* 35 Wis. 679; *Valin v. M. & N. R. Co.* 82 Wis. 1; *Heath v. Stewart*, 90 Wis. 418; *Butler v. M. & St. P. R. Co.* 28 Wis. 487; *Ferguson v. W. C. R. Co.* 63 Wis. 145; *Regan v. C., M. & St. P. R. Co.* 85 Wis. 43; *Kelleher v. M. & N. R. Co.* 80 Wis. 584; *Winchell v. Abbot*, 77 Wis. 371; *Siegel v. M. & N. R. Co.* 79 Wis. 404; *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247; *Duame v. C. & N. W. R. Co.* 72 Wis. 523; *Bower v. C., M. & St. P. R. Co.* 61 Wis. 457.

DODGE, J. On this appeal findings that defendant's train was running at an unlawful rate of speed, that the statutory crossing signals were not given, and that defendant's servants were guilty of negligence proximately causing the accident, are not seriously assailed. The assignments of error substantially resolve themselves into the contention that plaintiff's own evidence shows conclusively that the deceased was guilty of contributory negligence, in that he drove onto the crossing without proper or any efforts to inform himself whether a train was approaching, or with knowledge of its approach. The rule of law that he who intends to cross a railroad track is not free from negligence unless he make vigilant use of all his faculties to ascertain the approach of a train, has been repeated by this court under so many variant circumstances that its statement again seems hardly necessary. If, during any part of his course, the track is obscured from his vision, the duty is all the more imperative to avail himself of every possible unobscured opportunity, and, if partial obstruction to vision or hearing exist, to make effort to overcome such obstruction. Omission of any reasonable effort likely to be effective is negligence as matter of law, not merely is it evidence of negligence. Further, it is held that if the approaching train was visible the traveler will be pre-

sumed to have seen it, and his denial will not suffice to overcome such presumption. The cases in which these rules have been declared and applied have become so numerous as to make their repeated citation burdensome. The more important are mentioned in *Nelson v. D., S. S. & A. R. Co.* 88 Wis. 392; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; and *Vant v. C. & N. W. R. Co.* 101 Wis. 363. To the rules above outlined it may be added that he who sees an approaching train, in such proximity as to make haste necessary, cannot, consistently with due care, needlessly engage in a race with death by attempting to pass the crossing ahead of it. Such conduct is characterized as recklessness and gross negligence. *Langhoff v. M. & P. du C. R. Co.* 23 Wis. 43; *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 310; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 513.

In the case before us the deceased drove rapidly, and without pause, from a point 500 feet away to collision at the crossing. During the early part of his progress the onrushing peril must have been plain before his eyes. At another place, ninety feet from danger, he had opportunity to inform himself by the very slight exertion of standing in his buggy to look over the posts piled between the buildings. This we know he did not do, but either heedlessly or knowingly hurried forward into a space whence he could not see, and thence onward to the crossing. Thus, independently of his conduct upon reaching the right of way, the deceased was clearly guilty of negligence at two points in his progress before reaching it, first in the early part of it, near the elevator, for there he could have seen the train had he observed what was before his eyes. The only witness on the subject testifies: "He would have a very good view of the track for some distance from the elevators,— of the track south of the lumber yards and near what is known as the bridge." Respondent's counsel asserts that this part of the

track visible was only that more than 900 feet south of the crossing. Let that be conceded, still the train was in full view; for at the time deceased left the elevator, about forty-eight seconds before the collision, the train must have been about 1,600 feet south of the crossing, and coming toward deceased, in plain sight for some twenty seconds, while he traveled half of the 400 feet between the elevator and Water street.

He either did or did not see that train. If he did, the fact that he was urging his horse forward as he passed the lumber office and thence to the crossing is plenary evidence that he was attempting to reach and pass the crossing ahead of it; conduct which, as we have said, can be characterized only as gross negligence,—a wholly needless exposure of himself to a known peril. The balancing of the chances upon the relative speed of the train and his horse, and the assumption of so great a hazard when he might adopt the alternative slight inconvenience of waiting one or two minutes for the train to pass, is not permitted to one who would hold another liable for the result.

If, on the other hand, he did not see the train, his negligence was only less industrious and wilful. His failure to see must have been due to the most complete omission of any effort, and this, too, with the knowledge that he was about to pass into a space where his view would be obstructed; for he was entirely familiar with the crossing and its surroundings. No ordinarily careful man, intending to pass this crossing, would have omitted this opportunity to inform himself whether a train then about due was within half a mile. Again, as he turned onto Water street there was, as already stated, opportunity to ascertain whether there was an approaching train by rising in his buggy and looking between the office and the lumber shed. This was equally the part of ordinary caution, whether he had seen the train while leaving the elevator or had neglected to ob-

serve; for he was about to enter another space from which his view would be obstructed until he reached the tracks. Had he looked he would have seen the train, for his lines of vision would have extended over all the track from the bridge to a point within 300 feet of the crossing, as established either by geometrical computation or by application of a straightedge to the scale map in evidence. The engine must then have been about nine seconds, or 306 feet, from the crossing, with the train reaching 340 feet behind it southward. Had the train not been within his lines of vision, he would have been safe: it must have been either too near or too distant for collision.

Passing from the acts of negligence above discussed, the conduct of the deceased, as disclosed by the evidence, after he reached the railroad right of way directly north of the northwest corner of the lumber shed above described cannot be made consistent with due care. As he reached this point his view of the main track was obscured for only a space of 160 feet by the switch engine and tender standing on the side track. Between that engine and the south end of the lumber shed was a space of some fifteen or twenty feet, which gave him a view, continually enlarging as he progressed, of the track southward, and within this field of vision must have been the train at this moment. According to the distances and speed as found by the jury, the engine was approximately 175 feet from the crossing at the time the deceased passed the corner of the lumber shed, and behind it for 354 feet stretched the train. Whether these figures be perfectly accurate or not, they suffice to make it certain that some part of the train was visible only 200 or 300 feet away, and that the most casual glance to his left, as he entered upon the right of way, fifty feet from the crossing, or immediately thereafter, would have disclosed to him his peril. That he did not give even this casual glance seems an irresistible conclusion, for it is inconceivable that he would

have proceeded had he seen the train. Not having informed himself at either of the earlier opportunities whether or not the train then due was at hand, certainly it was the part of ordinary caution to have availed himself of this opportunity, the last before he placed himself irrevocably in peril. True, the jury finds that had he looked at this point he could not have seen, but such a finding cannot be sustained for a moment, as against the absolute physical demonstration furnished either by geometric calculation or the application of direct lines of vision to the map offered in evidence. Long before the deceased reached this point he necessarily knew that the switch engine and caboose had moved onto this side track and would obscure a part of the view, and the duty arose to exercise all the more vigilance to avail himself of the so limited space for observation. The evidence refutes such conduct; for, instead of pausing to secure the full benefit of the glimpse through this narrow space, he continued to urge his horse more rapidly forward. The conduct at this point, as well as while passing the space between the office and the lumber shed, marked, as it was, by increasing haste and forbearance to observe, seems inconsistent with any theory save that when leaving the elevator he had seen the approaching train, made up his mind to the effort to cross ahead of it, and was persisting in that effort, without seeking further to inform himself of the safety or peril. Whether that conclusion be the correct one or not, however, the neglect to look at these places was omission of that vigilance which the law demanded of the deceased, under all the circumstances. On no theory of his conduct was it consistent with due care. Not to look was negligence; to proceed after looking and seeing what he must have seen was likewise negligence.

The respondent lays much stress upon the presence of the engine and caboose upon the adjoining side track as a diversion of the attention of the deceased, and also as an assur-

ance to him, from the fact of its movement southward, that no train was approaching from that direction. He predicates both of these effects upon an erroneously stated situation. The picture which he draws is that of the passing engine and car in front of the deceased as he was going westward toward the track. This is not in accordance with the evidence. Mr. Weil, the only witness who saw that engine and caboose in motion, testifies that it passed over the crossing about a minute before the collision. This was before the deceased left the elevator; for, at the rate he traveled, he required but about forty-eight seconds from the elevator to the crossing. This engine, therefore, had started while he was still at the elevator, whence he could easily observe it, and had passed down the side track and over the crossing, and must have come to its stop, twenty or thirty feet south of the crossing, some seconds before he turned westward onto Water street, and the northerly end of it was plain before his eyes for a considerable distance.

It would be waste of space to enter upon comparison with various decided cases, where confusion, misconduct of horses, absence of customary flagman or gates, or other circumstances have been held sufficient to raise a question of fact as to a plaintiff's negligence. Under the general rules of law which are suggested above, each individual case must be decided substantially upon its own facts, and there is not enough similarity between the circumstances here presented and those of any of the decided cases to make analytical comparison beneficial. Suffice it to say that from the facts, which are substantially undisputed, nothing appears which could reasonably have forced his attention away from the ever-present and urgent duty to look out for this train known to be due, nor have served as an intimation or assurance to him that no train was approaching. Indeed, stoppage on the side track of the freight was rather the reverse in effect, and might well have suggested that the regular passenger train was at hand.

The conclusion of negligence arose irresistibly, and by operation of law, from plaintiff's own evidence as to the conduct of the deceased, and it was the duty of the trial court to have so decided upon defendant's motions for nonsuit, for direction of verdict, and for a new trial. Error was committed in the denial of each of those motions.

By the Court.— Judgment reversed, and cause remanded for new trial.

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DECK and others, Appellants, vs. DECK and another, Respondents.

March 22 — April 6, 1900.

Wills: Undue influence: Revocation.

1. The fact that a testator seventy-five years old, of sound and disposing mind, consulted with his wife, then in her last illness, and was influenced by her in the making of his will, which practically disinherited some of their children, is not a sufficient reason for setting aside the will, especially where the testator lived and retained his testamentary capacity for more than three years after his wife's death but did not change his will.
2. Sec. 2290, Stats. 1898, points out the only way in which a will may be revoked: a desire expressed by the testator to make other disposition of his property or to change his will will not effect a revocation.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *Tullar & Lockney*, and for the respondents on that of *T. C. Martin.*

CASSODAY, C. J. This is an appeal from the judgment of the circuit court admitting to probate what purported to be the last will and testament of Henry Deck, deceased. It appears and is undisputed or found by the court and jury or

the court, as matters of fact, in effect, that the will in question was executed in the presence of two subscribing witnesses, as required by the statutes, February 16, 1894; that the testator died at his home in the town of Ottawa, in Waukesha county, August 11, 1898; that at the time of executing the will he was possessed of testamentary capacity, and was of sound and disposing mind and memory, and knew the contents and purport of the will; that such will was his own voluntary act and deed, and was not the result or product of undue influence. As conclusions of law the court found, in effect, that the proponents were entitled to judgment admitting the will to probate, and gave certain directions as to costs, disbursements, and attorneys' fees, and that the record be remitted to the county court for further proceedings, and ordered judgment to be entered accordingly. From the judgment so entered, and affirming in all things the judgment of the county court, three of the nine children of the testator, to wit, *Julian J.*, *Lewis*, and *Philip*, bring this appeal.

It is undisputed that at the time of making the will the testator was seventy-five years of age; that his wife was then sick in bed, and died three days afterwards; that he and she consulted together as to the terms of the will while it was being drawn; that upon the death of the testator he left an estate of the value of $11,600; that he left, him surviving, nine children, to whom, by the terms of the will, he distributed his property and estate as follows: To Elizabeth, $2,500; to *Julia*, $2,900; to *George F.*, $2,000; to Edmund M., $1,000; to Margaret, $1,000; to Henry, $5; to *Lewis*, $100; to *Julian*, $5; to *Philip*, $5. All the rest, residue, and remainder of his estate, both real and personal, he, by the terms of the will, gave, devised, and bequeathed to his son *George F.*, and to his daughters *Julia* and Elizabeth, and he appointed such residuary devisees and legatees, and the survivors of them, executors of his will.

It appears that *George F.* was about thirty-nine years of age when his father died. He had remained at home nearly all his life, assisting his father. *Julia* was fifty years of age, and had never been married, but remained at home all her life, working for her father and mother. *Elizabeth* was married, and had three children, and resided some five miles distant from the testator. She qualified as executrix, but died about three and a half months after the death of her father. Henry lived about a mile from his father's place. All the other children lived at a considerable distance from their father,— some in distant states. All were on friendly relations with their parents, and all were perhaps friendly with each other, except it is claimed that *George F.* and *Julia* were not on friendly terms with Henry and *Philip*, and that such unfriendliness dated back many years prior to the execution of the will, and grew out of some business transaction. It is conceded that up to the time of his death the testator had sufficient mental capacity to make a valid will.

The principal objection to the validity of the will seems to be that the testator's wife, who was in her last sickness when the will was drawn, and who died three days afterwards, had a controlling influence in making the will, and in fact dictated the terms of the will. But with whom should he consult, and by whom should he be influenced, under such circumstances, if not by his wife, the mother of all his children? Presumptively, she was controlled by motives of natural affection and propriety, as well as himself. This court held, many years ago, that "motives of natural affection and gratitude on the part of the testator, and solicitations or arguments which appeal to such motives, do not constitute undue influence." *In re Jackman's Will*, 26 Wis. 104. In that case it was further held that: "Undue influence in such a case is such an influence that the instrument is not properly an expression of the will of the testator in

regard to the disposition of his property, but rather an expression of the will of another person." To the same effect are *Layman v. Conrey*, 60 Md. 286; *Matter of Mabie*, 5 Misc. (N. Y.), 185; *Stulz v. Schæffle*, 18 Eng. Law & Eq. 576. In this last case the testator, whose capacity was weakened to a certain extent by disease, was induced by the influence of his wife to alter his previous will, so as to be more favorable to her; but it was held that such influence was not undue, and further held that "importunity, to have legal effect, must be in such a degree as to take away free agency from the testator." In the case at bar the wife's influence, if exerted at all, was in favor of certain of her children, and in a way, apparently, to meet the approbation of the testator. Their reasons for making the will as they did were best known to themselves. That *Julia* and *George* should have more than the others was manifestly just. The testator, being of sound and disposing mind and memory, and under no undue restraint, had a perfect right to dispose of his property as he saw fit, and without consulting his children. If any provision of the will was inserted out of deference to the wish of his wife, and on reflection it did not meet with his best judgment, he had three years and a half after her death to change it; and the fact that he made no change is the best evidence that he did not desire to make any change. *Cutler v. Cutler*, 103 Wis. 258.

It is contended that the testator desired to make other disposition of his property, and that some time prior to his death he expressed a desire to change his will. But the statute clearly points out the only ways in which a will may be revoked. Sec. 2290, Stats. 1898; *Ladd's Will*, 60 Wis. 187; *Valentine's Will*, 93 Wis. 45. The evidence entirely fails to make a case within the statute, or to furnish any substantial reason for setting aside the will.

By the Court.— The judgment of the circuit court is affirmed.

ROSHOLT and others, Respondents, vs. CORLETT and wife, imp., Appellants.

March 22 — April 6, 1900.

Mechanics' liens: Subcontractors: Notice to owner: Evidence.

Unless a proper foundation therefor has been laid, oral testimony is incompetent to show compliance with the provision of sec. 3315, Stats. 1898, requiring subcontractors who claim a lien to give written notice thereof to the owner of the property affected.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

John A. Kelly, for the appellants.

For the respondents there was a brief by *William Fleming*, attorney, and *Anthony B. Rogan*, of counsel, and oral argument by *Mr. Rogan.*

WINSLOW, J. No extended statement of the facts of the case is necessary. The action was a consolidated action for the foreclosure of three alleged mechanics' liens in favor of subcontractors and materialmen against *Corlett*, the owner of the building, *Lizzie Corlett*, his wife, and the principal contractors for the building, Lesna and Jones; and the judgment established such liens and adjudged *Corlett* and wife personally liable. The complaints charged that the materials were sold and the work performed upon the joint request of the owner and the contractors, and did not allege the giving of the notice required by sec. 3315, Stats. 1898. Upon the trial it appeared without dispute that the materials were sold to, and the work was performed for, the principal contractors alone, and that neither *Corlett* nor his wife ordered the materials or made any contract with either of the plaintiffs. The only proof of the notice required by sec. 3315, *supra*, consisted of this question and answer, which was put to each claimant: "*Q.* You gave due notice to *Mr.*

Corlett? (Objected to as incompetent. Overruled, and exception taken.) *A.* Yes, sir."

This proof was utterly incompetent, because the notice required must be in writing, and no foundation for oral proof of it had been laid. The objection should have been sustained. The lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist. There being no competent proof of the giving of the notice, the lien was never proven. The finding to that effect is, therefore, unsupported by the evidence. It follows that the judgment of lien, as well as the personal judgment for the amount thereof against the appealing defendants, *Corlett* and his wife, must be reversed.

By the Court.— Those parts of the judgment adjudging liens upon the real estate named in the complaint and personal recoveries against the appellants, *Corlett* and wife, are reversed, and the action remanded with directions to dismiss the action as against said appealing defendants.

THE STATE EX REL. GRAFF and others, Appellants, vs. STEELE and others, Respondents. 106 475 113 109

March 22 — April 6, 1900.

School districts: Alteration by town board: Notice: Jurisdiction.

Under sec. 418, Stats. 1898 — providing that "whenever the town board shall contemplate the alteration of a school district they shall give" notice to the clerks of the districts affected — the board acquires no jurisdiction to make the change unless the giving of such notice be authorized at a meeting of the board duly held.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Reversed.*

This is an action of *certiorari*, brought by the relators, who

are electors and taxpayers of school district No. 3 in the town of Pewaukee, Waukesha county, Wisconsin, against the supervisors of said town, the object of the action being to reverse the action of said supervisors in creating a new school district in said town out of portions of school districts Nos. 1, 2, and 3. The relators claimed that the action of the board in creating said new school district was without jurisdiction, because the proper notice required by sec. 418, Stats. 1898, was not given. The defendants made return to the writ, wherein it appears that the petition for the formation of said new school district was presented to H. Cooper, who was then chairman of the town board of the town of Pewaukee, on the 23d day of May, 1898; that the board never met and acted upon the petition, but that Cooper made an order, signed by himself, fixing time and place for the hearing by the board of said petition, and directing notice thereof to be given to the clerks of the school districts from which the territory of the new district was proposed to be taken; that notice was given to said clerks according to the order; and that a meeting of the town board was held according to the notice, and the proposed new district was established. Upon the hearing of the case upon the merits, the action of the town board was adjudged regular and affirmed, and from that judgment the relators appeal.

For the appellants there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

C. E. Armin, for the respondents.

WINSLOW, J. The statute requires (sec. 418, Stats. 1898) that: "Whenever the town board shall contemplate an alteration of a school district *they* shall give at least five days, notice in writing to the clerk of the district or districts to be affected thereby, stating in such notice when and where they will be present to decide upon such proposed alteration, and such clerk or clerks shall immediately notify the

other members of the board." It was held in *State ex rel. Foster v. Graham*, 60 Wis. 395, in accordance with plain reason, that the giving of this notice is a jurisdictional prerequisite to the making of the order, and that it could not be waived.

The statute requires in no uncertain terms that the board shall give the notice. Upon familiar principles the board can only act at a meeting duly held. Individual action will not suffice. *McNolty v. School Directors*, 102 Wis. 261. In the present case the board never met, and never authorized the giving of the notice; hence they had no jurisdiction to make the order establishing the new district. The defect being jurisdictional, the action may be reviewed by the courts. *State ex rel. Foster v. Graham, supra.*

By the Court.— Judgment reversed, and action remanded with directions to reverse the action of the town board.

NELSON, Respondent, vs. NUGENT, Appellant.

March 22 — April 6, 1900.

Animals: Killing of sheep by dogs: Liability of owner.

1. The evidence in this case — showing, among other things, that after plaintiff's sheep had been killed by two dogs the tracks of one of them were traced to defendant's house and that the appearance of his dog was incriminating — is *held* sufficient, with the accompanying circumstances, to sustain a verdict that defendant's dog was concerned or engaged in the killing.
2. Under sec. 1620, Stats. 1898 (providing that "the owner or keeper of any dog which shall have . . . killed, wounded or worried any . . . sheep or lambs shall be liable to the . . . owner of such animals for all damages so done," etc.), if dogs of different owners unite in killing or worrying sheep each owner is liable for the whole amount of the damage so done.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action to recover damages for worrying and killing of plaintiff's sheep by the defendant's dog, in company with another dog whose owner is unknown. The issues involved were the identity and ownership of the dogs and the amount of damages done. The jury returned a verdict for plaintiff, and, under the instructions given them by the court, assessed the entire amount of damages against the defendant, notwithstanding the proof showed he owned but one of the dogs. Defendant appeals.

For the appellant the cause was submitted on the brief of *C. H. Van Alstine*, counsel. To the point that where dogs of different owners unite in worrying and killing sheep the wrong is not a joint wrong of the owners, but each owner must be sued separately for the damage done by his own dog, he cited, besides authorities cited in the opinion, *Adams v. Hall*, 2 Vt. 9; *Buddington v. Shearer*, 20 Pick. 477; *Russell v. Tomlinson*, 2 Conn. 206; *Van Steenburg v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Denny v. Correll*, 9 Ind. 72; *Cogswell v. Murphy*, 46 Iowa, 44; *Carroll v. Weiler*, 1 Hun, 605; *Dyer v. Hutchins*, 87 Tenn. 198.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

BARDEEN, J. It is unnecessary to discuss the testimony. It establishes beyond question that thirteen of plaintiff's sheep were killed, and others injured. The tracks of one of the dogs were traced to defendant's house. The appearance of the dog was incriminating, and, with the accompanying circumstances, there was evidence sufficient to justify the conclusion arrived at by the jury. We do not feel called upon to disturb it upon either ground suggested by counsel.

This action is based upon sec. 1620, Stats. 1898, which is as follows: "The owner or keeper of any dog which shall have injured or caused the injury of any person or property

or killed, wounded or worried any horses, cattle, sheep or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog or knowledge by him that his dog was mischievous or disposed to kill, wound or worry horses, cattle, sheep or lambs." The court charged the jury that "each owner of a dog which is concerned in or engaged in the killing, wounding, and worrying of sheep is liable for the whole amount of damages which his dog was concerned or engaged in doing." This is said to be erroneous, and the rule is asserted to be that when dogs of different owners unite in killing sheep, the wrong is not a joint wrong, but each owner must be sued separately for the damage done by his own dog. Cooley, Torts, 348.

As we read it, the statute has changed the common-law liability of the owners of dogs for injuries done by them. The object of the statute seems to have been to "encourage the raising of sheep and to discourage the raising of dogs." The danger of damage to sheep from dogs, and the difficulty of protecting flocks, is so great that it was deemed necessary to adopt stringent measures for that purpose. It is a well-known fact that dogs which have the propensity of killing sheep often travel in pairs and make their attacks together. It is practically impossible, in most cases, to tell what damage was done by one dog and what by the other. The difficulty of apportioning the damage led the legislature to adopt the language set forth in the statute, making the owner or keeper of a dog doing injury to sheep liable *for all the damage so done.* The circumstance that another dog was engaged in the same act does not lessen the liability, unless we are able to apportion the damage done by each dog. The impossibility of doing so is manifest. It cannot be done unless some arbitrary rule is adopted, as was done in a few of the cases cited by the defendant. *Partenheimer v. Van Order*, 20 Barb. 479; *Powers v. Kindt*, 13 Kan. 74.

In *Wilbur v. Hubbard*, 35 Barb. 303, two dogs killed sheep of the value of $19. The dogs were of unequal size, and, the defendant's being the larger, a verdict for $12 against him was sustained on the ground that the jury had a right to say that the smaller dog did not do as much damage as the larger one.

We must decline to follow the rule laid down by these cases. It is quite contrary to the terms and spirit of the statute. When these things are considered, it is but reasonable to hold that each owner of a dog engaged in doing the damage is liable for the whole amount of damage done. Any other holding would tend to emasculate the statute and deprive the sheep owner of the protection the statute was designed to give. Suppose two dogs, with different owners, together attack and frighten a traveler's horse, and damage ensues; under the rule sought to be invoked, the injured party could recover a fraction of his damages from one owner, to be measured according to the size of his dog, and the remainder from the other. This hardly accords with the true meaning and intent of the statute. The construction given the statute by the trial court, and here approved, finds support in the following cases: *Kerr v. O'Connor*, 63 Pa. St. 341; *Worcester Co. v. Ashworth*, 160 Mass. 186.

By the Court.—The judgment of the circuit court is affirmed.

SPAULDING and another, Appellants, vs. NORTH MILWAUKEE TOWN SITE COMPANY and others, imp., Respondents.
SAME, Respondents, vs. NORTH MILWAUKEE TOWN SITE COMPANY, imp., Appellant.
SAME, Respondents, vs. MEYER and others, imp., Appellants.

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January 11 — April 27, 1900.

Corporations: Promoters: Fraud: Sale to corporation by directors: Equity: Judgment: Joint and several liability: Receivers.

1. In order to entitle a corporation which has received property from promoters at a higher price than it cost them, or at a price above the fair market value, to rescind or to recover back the profits made by the promoters, the promoters must have deceived or misled some of their associates, either by affirmative words or acts, or by silence under such circumstances that they might reasonably apprehend that such associates might act upon a wrong assumption or understanding.
2. The owners of undivided interests in two tracts of land which they had purchased for $900 and $1.000 per acre respectively, agreed among themselves to form a corporation and convey the land to it at $1,500 per acre in exchange for stock. The owners of one interest sold part of it to third persons, without the knowledge or approval of their co-owners, at prices ranging from $1,200 to $1,500 per acre, upon the understanding that the interests purchased were to be turned over to the corporation under the agreement mentioned. When the agreement was about to be executed such purchasers appeared ready and willing to convey their interests to the corporation according to its terms, and it was thereupon carried out. One of said purchasers subsequently claimed that he had been induced to purchase at $1,325 per acre by the representation that the land cost $1,300. *Held*, that the fraud, if any, was personal to the complaining purchaser, and was perpetrated by his vendors alone and not in conspiracy with the other owners, and that a recovery therefor could not be had in an action to enforce corporate rights.
3. After the organization of the corporation in such case a third person purchased shares of stock, the representation being made as an inducement that the land "had been syndicated at a cost to the corporation of $1.500 per acre." *Held* that, even if the representation were false, no cause of action in favor of the corporation arose by reason thereof.

4. Although it is not forbidden for directors of a corporation to sell their property to it, they owe it the duty not merely of full disclosure of all material facts, but diligent and faithful endeavor to promote its interests.
5. Two of the seven directors of a corporation, in whose name the title to a tract of land containing 8.09 acres stood, offered it to the corporation at $1,100 per acre, representing that such price was an advance of $100 per acre or ten per cent. over the price paid, and the offer was unanimously accepted. The value of the land exceeded the price paid, but it was not explained that the land had been purchased as six and one-half acres for $6,540, nor was it disclosed that two other directors, who were active real-estate men and better versed in values than the remaining three directors, were also interested in the land. *Held*, that the corporation might recover back not only the undisclosed profits but also the ten per cent. profit which was not concealed.
6. In an action in the name of certain stockholders to enforce the right of the corporation to recover back such profits, it appeared that the corporation had been dissolved; that the holders of nearly nine tenths of the stock had joined in the liquidation of the corporation and division of its assets, and had surrendered their stock and released any claim or right to be reimbursed for their share of the moneys obtained by defendants from the corporation; that plaintiffs were indebted to the corporation for assessments on their stock; and that the other holders of the stock which had not been surrendered were not before the court. *Held*, that the recovery should be in the name of the corporation, as trustee for the plaintiffs and the other holders of unsurrendered stock, to be paid over to them or credited upon their indebtedness to the corporation.
7. The appointment of a receiver for the corporation in such case was not necessary.
8. All the directors of a corporation who participated in obtaining money from it in derogation of their duties are liable jointly and severally for the entire amount out of which the corporation was defrauded, and not each director individually for the share realized by him.

APPEALS from a judgment of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Reversed.*

In this case the active defendants are *Willis A. Meyer* and *Otto Finck*, together, as the firm of Meyer & Finck; *Charles A. Maynard* and *A. D. Agnew*, together, as the firm of May-

nard & Agnew; and *Win J. Morgan.* They will be designated as "the defendants" hereinafter. The *North Milwaukee Town Site Company* will be designated as "the corporation." Momsen is not a party to the appeal, the judgment dismissing the complaint as to him not being complained of.

The overwhelming preponderance of the evidence establishes, though in many respects the court found otherwise, that the defendants on October 19, 1892, consummated purchase of the two tracts of land from Spuhl and Wasserburger in the name of Meyer & Finck, but owned by all of them in common, as follows: Meyer & Finck, one half, Maynard & Agnew, one fourth, and *Morgan* one fourth: that there was great excitement and activity in real estate in the locality at the time; that they purchased it for purposes of speculation and resale; that they considered various methods of disposal, either by resale in bulk, by platting and offering individual lots for sale, or by "syndicating." They finally decided on the latter plan, and decided to organize a corporation as a method of disposing of the shares to others, and decided to fix the value of the property for the purposes of capitalization at $1,500 per acre, each to contribute his undivided share at that price; it having originally cost them $900 and $1,000 per acre for the respective tracts. Meanwhile, and before the corporation was organized, Meyer & Finck, without the knowledge or approval of the other defendants, sold portions of their interest to some half dozen persons at various prices, upon the understanding that the shares so sold were, when the property was turned over to the corporation, to be compensated by stock at the rate of $1,500 per acre. These sales were made at prices ranging from $1,200 to $1,500 per acre. The plaintiff *Spaulding* purchased from the defendants Meyer & Finck an undivided one-sixteenth, for which it was agreed he was to receive sixty-two and one-half shares, fifty per cent. paid, of the

stock of the new corporation, which should be one sixteenth of its total stock. The corporation was formed, and the real estate conveyed to it at the rate of $1,500 per acre (which did not exceed its fair value), in accordance with a resolution of the board of directors,—amounting to $92,632.50, of which $45,275 was secured by mortgage, and the rest of the price satisfied by the defendants. The method of bookkeeping pursued was by charging the cash account with fifty per cent. of the amount of each share of stock (total $50,000), and crediting the cash account with the purchase price of the land above said mortgages, or $47,357.50, leaving in treasury $2,642.50.

Some three months after the corporation had been organized, the defendants Maynard & Agnew sold thirty-four shares of their stock to the plaintiff *Bishop*, representing to him that the land of the corporation had been "syndicated" to it at $1,500 per acre. No representations are proved to have been made to any of the original subscribers for stock except *Spaulding*, inconsistent with the facts as they exist, and no others complain of the transaction, but have all, with full knowledge of the facts, settled, surrendered their stock, and received their share of the company's real estate in severalty. The plaintiff *Spaulding* claims that he was induced to make his purchase from Meyer & Finck by their assertion to him that the land had cost them $1,300 per acre, and that they would sell one sixteenth to him for $25 advance, or $1,325 per acre, preliminary to incorporating. This is strenuously denied, but the findings are in accordance with the plaintiff's statement. No knowledge of this transaction is brought home to the other defendants, either as to Meyer & Finck's purpose to sell, the price paid, or any representations made, nor did they in any way share in the proceeds of such sale.

Differt tract: Shortly after the organization of the corporation, the defendants other than Momsen purchased in the

name of Meyer & Finck a tract of land of one Differt at the price, as fixed in negotiation, of $1,000 per acre. He, however, declined to submit to a survey, and insisted that his statement of the quantity of the land be taken, which was acceded to, and he paid on the basis of about six and one-half acres, viz. $6,540. At that time four of the defendants were members of the board of directors of the defendant corporation. After this purchase Meyer & Finck submitted to the plaintiff *Spaulding*, who was engineer for the company, the advisability of the corporation buying this tract, to add to what it already had; represented that it cost them $1,000 per acre, and that they would sell it to the corporation for $1,100 per acre, although they had received higher offers. The other directors, upon a favorable report by the plaintiff, made after examining the land, approved the purchase from Meyer & Finck, and it was accordingly made; but meanwhile, a survey having been made by the defendants, it was found that the property contained 8.09 acres, and they accordingly received from the corporation $8,900 for it. The fact of Meyer & Finck's ownership, and of their profit of $100 per acre, was disclosed, but the discrepancy in quantity was not, nor the interest of the other defendants. There is no evidence to establish that the defendants had made the survey and ascertained the discrepancy as to area at the time of making the representations to *Spaulding*, though they had at the time of the resolution for its purchase. If allowed ten per cent. advance on the cost to them, the defendants still made a profit of $1,706.

While substantially all of the original subscribers to stock are still owners to some extent, the capital stock has been very largely sold and transferred, so that their proportions are very different, and a large share of the capital stock is held by those who are not incorporators or original subscribers, with no evidence as to price paid.

After the incorporation the property was platted and

thrown upon the market in lots, and considerable sales were made at prices in the neighborhood of $4,000 per acre up to the time of the panic, when sales practically ceased. In February, 1895, after calls, additional to the original fifty per cent., amounting to twenty-seven per cent., had been made and mainly paid, the corporation was in straitened circumstances, owing a considerable amount of interest on mortgages which contained options giving the privilege of declaring the whole principal due for nonpayment of interest, and for moneys borrowed to pay previous instalments of interest, aggregating apparently about $6,500. At that time the plaintiff, with some other stockholders, had agitated the question of the defendants' liability to account for profits made on the Spuhl and Wasserburger tracts, which was resisted by them, they claiming that they were the owners of the land and had sold without misrepresentation to the corporation and were entitled to their profits. The facts were fully set forth before a meeting of the stockholders, which had been called at the instance of plaintiffs for the purpose of devising means to carry the corporation without further calls on the stockholders. At that meeting, held February 14, 1895, a stockholder offered a resolution proposing to these defendants that if they would carry the corporation over the next year, protecting it against defaults by the loan of their credit, such financial service should be accepted in full satisfaction of any claims the corporation might have against them by reason of the making of such profits. This resolution was adopted by a reasonably close vote, requiring the vote of the stock represented by these defendants to make a majority. The proposition was accepted by the defendants, and carried out by them. At a directors' meeting in July the defendant *Finck*, who was treasurer, reported that he had paid certain of the pressing liabilities, which were among those the defendants were to take care of; but the directors might have inferred

from the financial condition of the corporation that such payment had been accomplished by the defendants in performance of their agreement. A resolution was offered to ratify that action, which, according to the minutes of the meeting, was carried unanimously. Plaintiff *Spaulding* testifies that he did not vote in favor of it, but remained silent, and that he supposed the report referred to old indebtedness which the treasurer ought to pay in any event.

In November, 1895, a proposition was made to disband the corporation and divide its remaining assets, including an assessment of twenty-three per cent. upon the capital stock to bring it up to par, among the stockholders. Plans of division were made, and in 1896 a division was made; lots and land contracts being transferred to individual stockholders, and their stock surrendered in payment. Neither of the plaintiffs has acted under that resolution, and neither surrendered his stock nor received a share of the property; but all of the other original subscribers and all the other stockholders, except the holders of twelve shares, have done so. The corporation has been legally terminated, and its affairs are now being wound up by the directors as administrators.

The trial court rendered judgment against the several defendants, except Momsen, for his proportionate share of $34,275 profit made by them on the original tracts, and of $2,359 profit on the Differt tract, with interest from February 16, 1893. The judgment also directed appointment of a receiver of all the property of the corporation, with power to enforce collection of the amounts adjudged. The complaint was dismissed as to Momsen. The plaintiffs appeal, complaining that the recovery should have been for the whole amount against all the defendants except Momsen jointly and severally. The defendant corporation appeals from that part of the judgment directing a receiver of its property, and the individual defendants, except Momsen, appeal separately from the whole judgment.

W. J. Turner and *Lynn S. Pease*, for the plaintiffs.

For the defendant *North Milwaukee Town Site Company* the cause was submitted on the brief of *Quarles, Spence & Quarles.*

For the other defendants there was a brief by *Timlin & Glicksman*, and oral argument by *W. H. Timlin.*

The following opinion was filed February 27, 1900:

DODGE, J. The proposition of law with which the judgment appealed from seems most nearly consistent is that if the owners create a corporation and turn over their property to it at a price exceeding its cost to them, they may be held to account to the corporation for the difference between such cost and the price to the corporation. On no narrower rule could be predicated liability against defendants *Morgan, Maynard*, and *Agnew*, who were wholly innocent, not only of misrepresentation, but of knowledge that any subscriber was in ignorance of any facts. Even on this proposition, however, the judgment is inconsistent; for the plaintiff *Spaulding* and those whom he designates as similarly situated, namely, those who purchased shares in the real estate from Meyer & Finck at prices less than $1,500 per acre, for the purpose of incorporating at that figure, are exempted from its application, and not only held to no liability for the profits so made by them, but given a share of the mulct imposed on the defendants, which included the very profits gained by *Spaulding*. Of the $17,137.50 so-called profits adjudged against Meyer & Finck, $3,906.25 was not received by them at all, but was received by plaintiff *Spaulding* and "those similarly situated;" yet Meyer & Finck are required to pay that in, and these profit-sharing plaintiffs are permitted to make profit twice from the same acts which the court condemns in the defendants. Such result shocks every principle of equity and justice. We need not, however, attempt to unravel the tangle of reasoning which has led to that result; for the proposition of law above stated is with-

out support in the authorities, and the facts established present a situation very different from that outlined by the findings and assumed by the judgment. We consider first the original transaction with reference to the Wasserburger and Spuhl tracts.

The liability of promoters of corporations is predicated on fraud, an essential element of which is deceit. *Franey v. Warner*, 96 Wis. 222; *Milwaukee C. S. Co. v. Dexter*, 99 Wis. 214. It is not enough that the corporation receives property at a higher price than it cost the promoters, or at a price above its fair market value, to give to the corporation a right to rescind or to recover back profits made. *Whitehill v. Jacobs*, 75 Wis. 474; *Milwaukee C. S. Co. v. Dexter, supra.* It must have been deceived and misled into paying such price. But the corporation as an entity cannot be deceived, save as some of the individuals composing it are. True, the acts and conduct which may constitute actionable fraud in promoters differ from that which would be necessary in other relations; for they owe *uberrima fides* to the corporation they create, and will often be held bound to speak under circumstances which would permit another to be silent. There must, however, be actual misleading of some of their associates, either by their affirmative words or acts or by their silence, and, if the latter, under such circumstances that they may reasonably apprehend that such associates may otherwise act upon a wrong assumption or understanding. The rule is stringent that, in dealing with a corporation which they organize, promoters must make full disclosure and the transaction must be open and free from misleading concealments; but mere silence cannot be misleading to one otherwise fully informed. The decisions in this court are numerous and all speak the same principles. *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; *Whitehill v. Jacobs, supra; Fountain Spring P. Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner, supra; Hebgen v. Koeffler*, 97 Wis. 313; *Limited I.*

Asso. v. Glendale I. Asso. 99 Wis. 54; *Milwaukee C. S. Co. v. Dexter, supra; First Ave. L. Co. v. Hildebrand,* 103 Wis. 530; *Zinc Carbonate Co. v. First Nat. Bank,* 103 Wis. 125; *Jenkins v. Bradley,* 104 Wis. 540.

Applying these considerations to the case in hand, we find that the defendants entered into an agreement among themselves to organize this corporation and convey to it this land, which they already owned, at $1,500 per acre. That agreement was perfectly valid, legitimate, and fair, for each knew all that any of them did. After this agreement, and when it was about to be executed, the plaintiff and four others appeared, having portions of Meyer & Finck's share, which they were ready and willing to convey to the corporation on the terms of the agreement already existing between the defendants. How they acquired their interests, at what prices, or with what information, were wholly unknown to the defendants *Morgan, Maynard,* and *Agnew,* who had no facts or circumstances to suggest to them that such subscribers could be misled or confirmed in any error by their silence. It is plain that no duty of explanation or information could thus be cast on these three defendants, and as they were guilty of no misstatement or misinformation, and as none of the subscribers were contributing anything to the corporation except shares in the land, obviously it cannot be said that they deceived, even in the legal sense, any of their associates or the corporation. They had no reason to suppose that Meyer & Finck had been guilty of any fraud. These three defendants neither did nor refrained from doing anything which could mislead any of their associates, nor did they receive any of the profits resulting from the dealings of Meyer & Finck. No liability, therefore, can arise against them either for injury to the corporation or for profits to themselves, and no recovery can be had against them by reason of the original incorporation and the conveyance of the Spuhl and Wasserburger tracts.

Turning now to the transaction of Meyer & Finck with the plaintiff *Spaulding*, we find them, some two weeks before the incorporation, proposing to sell him an interest in land already owned, *and to sell at a profit.* In this there was, of course, nothing of the idea which underlies the promoter's liability, namely, assuming to join with others in a mutual enterprise, and to act for the association, so that it had a right to rely on their fidelity to the joint interests. It was a proposition for bargain and sale. This plaintiff then examined the land, and agreed to purchase one sixteenth at the price named. Thus far, of course, there was nothing to impose on Meyer & Finck any liability, save that which rests on every vendor who is guilty of direct fraud. The plaintiff, however, knew and understood that they proposed to turn the property, including his sixteenth, over to a corporation, and he knew it was to be so turned over, not at what it cost Meyer & Finck, nor at the price he paid for his interest, but at a higher price, viz. $1,500 per acre. (His admissions make perfectly certain his knowledge of this corporate price, although he attempted to deny such knowledge.) If he considered that that corporate price was an assertion to the corporation that the land was to be bought for it by Meyer & Finck at that sum, or an assertion that none of the promoters were to receive any profit therefrom, so as to constitute a fraud on the corporation, he clearly made himself a party to such fraud. He was in the position, not of the innocent subscriber to stock, relying on equality of all, but one of a conspiracy to defraud it, and should be a defendant, like each of the others, for the whole amount of the profits fraudulently extracted from the corporation. Upon that view of the situation, he is not a fit plaintiff to champion in a court of equity the rights of innocent subscribers who relied on the price named in the resolution of purchase adopted at the first meeting of directors. We do not, however, think this a fair statement of his position, nor of that

of any of the other subscribers. They all, except perhaps Maxwell, knew that there was a nominal profit being made by themselves. (Maxwell says he gave no thought to that question, and was not led to believe that the land was to be purchased by Meyer & Finck for the corporation, or that it cost them $1,500 per acre.)

It is clear, therefore, that whatever there was of fraud, deceit, or misleading did not relate to the incorporation or the transfer of the land to it. None of the subscribers were induced to believe that Meyer & Finck or any of the officers were to buy the land *for* the corporation at $1,500 per acre, or that such was the price which had been paid for it by them, or that they were to make no profit out of it. All except Maxwell were making profit, and each should have assumed that the others were. The situation is, in principle, even on plaintiffs' own showing, like that presented in *Getty v. Devlin*, 54 N. Y. 403, where part of the subscribers had been defrauded into an associated purchase of land at $125,000, and all agreed upon turning it over to a corporation organized by themselves, at $1,000,000. The corporation was not defrauded and had no right of action, but the several purchasers were held entitled to recover in their own right the amounts of profit made out of them in their original purchase, not the profits resulting from the incorporation. The fraud, if any, proved in this case was personal to the plaintiff, perpetrated by Meyer & Finck alone, and not in conspiracy with the other defendants. The right arising therefrom is in no sense to the corporation, but to the plaintiff *Spaulding*, and must be enforced in some one of the four forms of action described in *Franey v. Warner*, 96 Wis. 222. It, however, is not recoverable in this action, brought as it is to enforce corporate rights. *Jenkins v. Bradley*, 104 Wis. 540.

The transaction had by the other plaintiff, *Bishop*, is even more remote from the act of incorporation. Three months

after the company had been organized and doing business, he purchased from Maynard & Agnew thirty-four shares of stock at par, and the only representation found by the court to have been made as an inducement to such purchase was that the land "had been syndicated at a cost to the corporation of $1,500 per acre." That representation was strictly true, but, even if false, no cause of action arises to the corporation from a fraudulent sale of shares by one of its stockholders, which is in no wise connected with the original organization.

All the other subscribers to the incorporation concede that they were not defrauded or deceived, and have assented to the retention by defendants of the price agreed on for the two original tracts of land, and, by entering into the scheme for dissolution of the corporation, have knowingly and voluntarily released any claims otherwise maintainable.

We are constrained to hold that none of those associated in organizing this corporation were deceived or misled with reference thereto, or with reference to the sale of the property to it by the defendants or any of them, and consequently that no deception was practiced upon the corporation to give it either a right of rescission or a right to reclaim any part of the price paid for the Spuhl and Wasserburger tracts.

The sale of the Differt tract by these defendants to the corporation some three months after its organization has a wholly different aspect. That transaction was distinctly a corporate one. These defendants constituted a majority of the board of directors, and were therefore both buyers and sellers. They were then in the position of trustees, and owed to the corporation the duty of the very highest good faith,— not merely full disclosure of all material facts, but diligent and faithful endeavor to promote its interest,— though it was not forbidden them to sell their property to the corporation, provided the transaction was in every way

open and fair. *Franey v. Warner*, 96 Wis. 236; *Milwaukee C. S. Co. v. Dexter*, 99 Wis. 214. Nothing short of that high good faith and full disclosure can, however, justify them in making and retaining profits out of such sale. The salient facts are that it was disclosed that Meyer & Finck owned the tract, but not that the other defendants were interested with them. It was represented that the offer to the company at $1,100 per acre was an advance of $100 per acre or ten per cent. over the price paid, but it was not explained that it had been purchased as six and one-half acres for $6,540, while it was being sold as 8.09 acres (its true dimensions) for $8,900. If, therefore, defendants were allowed to make the profit of ten per cent. which the plaintiff was informed that the price of $8,900 included, they would still be in receipt of $1,706 further profit secretly made and as the result of representations so misleading as to be false. That amount the corporation would at once have been entitled to recover.

More difficult is the question of the right to recover the $654 profits, which were not concealed, but openly claimed by Meyer & Finck by reason of the market value of the land, which is quite well shown to have considerably exceeded $1,100 per acre at that time. At the date of the purchase the board of directors, who voted unanimously to make it, was composed of four of the defendants, *Meyer*, *Finck*, *Morgan*, and *Agnew*, and three others, all present. No one can tell to what extent the conduct of the three disinterested directors was affected by their reliance upon the judgment of *Morgan* and *Agnew*, whom they had a right to suppose free from any adverse interests, and who were active real-estate men and better versed in values than the nondefendant directors, except perhaps Newton. It may well be that the other directors would not have consented to this price had they known that *Morgan* and *Agnew* were interested and their judgment perhaps biased by that fact. The fidelity

which directors owe to their colleagues and to their constituents required disclosure of such interest. They must have known that the others were likely to act upon an assumption contrary to the fact, for the resolution for purchase itself declared the ownership of Meyer & Finck, thus impliedly denying any interest in any one else. We conclude that this $654 of profit also was paid under such circumstances that the corporation could recover it back, thus making a total improper profit on the Differt-tract purchase of $2,360 (or $2,359, as the findings have it), for which the corporation had a right of action which plaintiffs may enforce here so far as they and others in like situation are interested, the corporation having refused to sue on their demand.

Defendants lay great stress upon a resolution releasing them from all liability in connection with purchase of the land, in consideration of certain services to be rendered. Without going into the question of the manner in which this resolution was adopted, or the conduct then or subsequently of these plaintiffs, from which the court below found that they were neither estopped nor guilty of laches, it suffices to say that most careful examination of the corporate proceedings and of the testimony fails to disclose that the Differt-tract transaction was at all involved in the consideration or adoption of that resolution, or had come to the notice of any of those who supported it. No reference by any speaker was made to that transaction, and the whole proceedings indicate that the sole subject of debate or compromise was the profit made on the Wasserburger and Spuhl tracts, which we have already disposed of on other grounds. We agree with the court below that no estoppel or laches is established to preclude plaintiffs' recovery for the profits realized by defendants on the Differt tract.

It appearing then that the corporation as such would be entitled to recover from the defendants the sum of $2,359,

with interest from February 15, 1893, we are met by the consideration that all of the stockholders, except the plaintiffs and other holders of twelve shares, settled, accepted satisfaction for their stock, and released any claim or right to be reimbursed for their share of the moneys obtained by defendants from the corporation, and the question is presented of the proper form of the judgment. If this were a direct proceeding by the corporation, and the recovery were had in an action at law, there might be no escape from the entry of a money judgment for the full amount, but this is an equitable action brought by two of the suffering stockholders to enforce their ultimate rights through the medium of the corporation as a trustee for them. *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245, 256. The great advantage of equitable procedure over an action at law consists in the elasticity of the relief it may accord, and the ability to adjust and frame its decrees so as to accomplish complete remedy to all litigants, without undue or unnecessary burden to any. In the present case the corporation, being dissolved, has no use for money, except for distribution as a trustee to its stockholders. It would be a reproach to equity jurisprudence if we could not avoid the absurdity of compelling these defendants to pay over to the corporation moneys which as their trustee it must at once return to them, either in their own right as stockholders, or in the right of others who by settlement have released their claims. No such absurdity is necessary, however. A very similar situation was presented in *Jenkins v. Bradley*, 104 Wis. 540, and was successfully met. The proposition was recognized that, while the action is ostensibly to recover what is due the corporation, yet when all parties are before the court the forms may be brushed aside, and the rights of those individual beneficiaries, who would be entitled to the money after it was recovered by the corporation, be protected and enforced. There, after establishing such right of recovery in the corporation, and find-

ing that certain of the stockholder beneficiaries had settled and released their rights, the court computed the amount which, paid from the defendants to the plaintiffs, would accomplish the same ultimate result as the payment of the whole recovery into the corporate treasury and its distribution out again.

The same thing can be done here. The amount to which the corporation would be entitled is $2,359, with interest from February 15, 1893. The plaintiff *Spaulding* is the holder of $\frac{1}{16}$ of the total stock of the corporation, the plaintiff *Bishop* is the holder of $\frac{34}{1000}$, and the unnamed stockholders who have not settled are the holders of $\frac{12}{1000}$, or a total of $\frac{1086}{10000}$. The defendants, therefore, should pay to the plaintiff *Spaulding* $147.44, to the plaintiff *Bishop* $80.20, and to the holders of the twelve shares of stock $28.30; each of said sums to draw interest from February 15, 1893, to the time of the entry of judgment. This being done, the plaintiffs will have received all to which they would be entitled through the machinery of collection of the whole amount by the corporation and distribution; and, if there were nothing more to the situation, a money judgment for this amount, such as was ordered in *Jenkins v. Bradley*, would be proper. In the present case, however, we have the fact that the holders of the twelve shares of stock are not disclosed, so that no judgment can be rendered in their favor. We also have the fact that both *Bishop* and *Spaulding* are indebted to the corporation for assessments on their capital stock. We conclude, therefore, that the rights of all parties can be better protected by ordering a recovery in the name of the corporation as trustee for the two plaintiffs and such other holders of capital stock as have not yet joined in the liquidation of the corporation and division of its assets nor surrendered their stock; such corporation, as trustee, however, to apply the recovery, in the proportions above pointed out, to the beneficiaries above named, either by crediting it

upon any indebtedness of those beneficiaries to the corporation or by paying it over to them.

Considering the appeal of the defendant corporation from that part of the judgment which directs a receiver to be appointed, it is apparent, in the light of the decision reached on the principal questions, that no receiver can be necessary, unless, indeed, the administrators of the corporation shall hereafter be derelict in their obedience to the judgment which may be entered in this action, and the judgment appealed from must in that respect be reversed.

The plaintiffs also appeal from the judgment for the reason that it holds the defendants each to an individual liability for only the share of the profits realized by him. This is erroneous, under the rule laid down in *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125. They were all participants in the plan of extorting moneys from this corporation upon the sale of the Differt tract, in derogation of the duties of their fiduciary capacity, and their liability is joint and several. The judgment to be entered will be against each and all of the defendants other than the corporation and Momsen.

By the Court.— Judgment reversed on each of the several appeals, and cause remanded with directions to enter judgment in accordance with this opinion; appellants *Finck*, *Meyer*, *Morgan*, *Maynard*, and *Agnew* to be entitled to but one joint bill of costs.

The plaintiffs moved for a rehearing.

For the motion there was a brief by *W. J. Turner* and *Lynn S. Pease*, and in opposition a brief by *Timlin*, *Glicksman & Conway*.

The motion was denied April 27, 1900.

ILLINOIS STEEL COMPANY, Appellant, vs. BUDZISZ and wife, Respondents.

February 5 — April 27, 1900.

Amendment of pleading: Terms: Limitation of actions: Adverse possession: Privity: Tacking: Statute of frauds: Oral transfer.

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1. The allowance of an amendment to a pleading under sec. 2830, Stats. 1898, will not be held an abuse of discretion on appeal if it has some reasonable ground to support it in view of the facts; and the legal presumption is that it has such ground until the contrary is made to appear.
2. Sec. 2830, Stats. 1898, does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend a pleading. Where there is neither reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for, it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law.
3. In an action of ejectment the defendants were poor people, unacquainted with legal matters, and their attorney by mistake failed to plead the statutes of limitations. After the lapse of some twenty-one months they employed other attorneys, who on the day of the trial, which took place shortly after the substitution, offered an amended answer curing the omission. The only objection by plaintiff was want of power in the court to permit it. *Held*, that the allowance of such amendment without the imposition of terms was not an abuse of discretion.
4. Actual, hostile, exclusive occupancy of land, completely dispossessing the true owner, without any presumption or claim of right, will ripen into title, under sec. 4207, Stats. 1898, if continued for the requisite period.
5. Such an occupancy of land does not, before the expiration of the period within which the owner may reclaim possession, constitute any estate or interest in the land, nor is the substitution of another occupant, to continue the dispossession of the true owner, the transfer of any such estate or interest, within the meaning of sec. 2302, Stats. 1898. The privity, therefore, between successive occupants, which is necessary to continue the dispossessed condition of the true owner and unite the connecting possessions of such occupants into one continuous adverse possession referable to the first entry,

does not require a written conveyance but may be based upon a mere oral authorization of the succeeding occupant to take the place of his predecessor.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action of ejectment. The subject of the controversy was an irregular piece of land about 40 feet wide by 170 feet long, defined, as to boundaries, by actual possession by the defendant. The complaint was in the usual form. The only material issues presented by the answer, originally, were raised by a general denial. The case was brought to trial on the part of defendants by attorneys substituted for the one who interposed the answer, some twenty-one months having elapsed since the action was commenced. On the day of the trial, before the jury was impaneled, an amendment to the answer was permitted, setting up the ten and twenty years' statutes of limitations. Exception was taken by plaintiff's counsel to the allowance of such amendment. The evidence conclusively or strongly tended to prove, and plaintiff's counsel, in substance, admitted, that more than twenty years prior to the commencement of the action one John Skoczek inclosed the premises with a fence, built a house thereon, and thereafter occupied the same continuously till about 1886, when he sold out and transferred the property and possession thereof to defendant *Joseph Budzisz* for a valuable consideration, who occupied the same continuously thereafter down to the time of the trial. The court decided that adverse possession of the property commenced when Skoczek inclosed and commenced to occupy the same; that he and his successor in possession occupied the property continuously for more than twenty years before the action was commenced; that the parol transfer of the property from Skoczek to *Budzisz*, and the entry by the latter under the former pursuant thereto, made the adverse possession thereof exclusive and uninterrupted from the

time possession was taken by Skoczek. In accordance therewith a verdict was directed in favor of defendants, upon which the judgment appealed from was rendered.

For the appellant there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*. They contended, *inter alia*, that possession is an "interest" in lands, and a sufficient interest therein to entitle the possessor to maintain ejectment against an intruder into his possession. *Bates v. Campbell*, 25 Wis. 613; *Howard v. Easton*, 7 Johns. 205; *Moore v. Moore*, 21 Me. 350. A judgment against a person in possession becomes a lien, and his possession may be sold on execution. *Jackson v. Parker*, 9 Cow. 80, 85. A sale and transfer of such possession is most certainly, therefore, a sale and transfer of an "interest" in lands, and is included within the statutory prohibition. Privity of estate or possession, sufficient to establish the defense of the statute of limitations, cannot be transferred by parol. *Bailey v. Wells*, 8 Wis. 141; *Sydnor v. Palmer*, 29 Wis. 251–253; *Furlong v. Garrett*, 44 Wis. 111; *Graeven v. Dieves*, 68 Wis. 317; *Elofrson v. Lindsay*, 90 Wis. 203; *Ablard v. Fitzgerald*, 87 Wis. 516; *Dhein v. Beuscher*, 83 Wis. 316; *Sheppard v. Wilmott*, 79 Wis. 15; *Pepper v. O'Dowd*, 39 Wis. 548; *Stevens v. Brooks*, 24 Wis. 326; *McEvoy v. Loyd*, 31 Wis. 142; *Fuller v. Worth*, 91 Wis. 406.

For the respondents there was a brief by *Fiebing & Killilea* and *M. C. Krause*, and oral argument by *O. J. Fiebing*. They argued, among other things, that although the adverse possession must be continuous and uninterrupted, it is immaterial whether it be held for the entire period by one person or by several persons in succession, provided there is a "unity of possession" or, in other words, a privity of estate or title. 1 Elliott, Gen. Prac. § 297; *Wollman v. Ruehle*, 100 Wis. 31, 34, 35; *S. C.* 104 Wis. 603. The several possessions of successive disseisors may be "tacked" together so as to make a continuous possession, where there is privity

of estate or title. The privity required to constitute continuous adverse possession may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the original entry. No paper evidence of a transfer of possession is necessary when the property is held under the claim of the first entryman, but the continuity may be shown by parol. *Allis v. Field*, 89 Wis. 334; *Ryan v. Schwartz*, 94 Wis. 411; 2 Ballard, Law of Real Prop. § 25; Sedgwick & Wait, Trial of Title to Land, § 748; 6 Wait, Act. & Def. 455; 2 Wood, Limitations, § 271; Newell, Ejectment, § 53, p. 740; *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736; *Vandall v. St. Martin*, 42 Minn. 166; *McNeely v. Langan*, 22 Ohio St. 32, and cases cited; *Menkens v. Blumenthal*, 27 Mo. 198; *Crispen v. Hannavan*, 50 Mo. 544; *Cunningham v. Patten*, 6 Pa. St. 358; *Scheetz v. Fitzwater*, 5 Pa. St. 126; 1 Am. & Eng. Ency. of Law (2d ed.), 844; *Weber v. Anderson*, 73 Ill. 439; *Schuffleton v. Nelson*, 2 Sawyer, 545; *Alexander v. Pendleton*, 8 Cranch, 462.

The following opinion was filed February 27, 1900:

MARSHALL, J. Two questions are presented for consideration: (1) Did the trial court err in allowing the amendment pleading title by adverse possession? (2) Did the possession of the second occupant, under the circumstances, continue the possession of his predecessor so as to satisfy the statutory call for an uninterrupted twenty years' continuous adverse possession?

1. Sec. 2830, Stats. 1898, says: "The court may, upon the trial . . . in furtherance of justice and upon such terms as may be just, amend any pleading . . . by correcting . . . a mistake in any respect, or by inserting other allegations material to the case." The power to grant amendments under the statute is very broad, and its exercise rests solely in the sound discretion of the trial court, whose de-

cision cannot be disturbed except for a clear abuse of judicial power. *Phœnix M. L. Ins. Co. v. Walrath*, 53 Wis. 669; *Smith v. Dragert*, 61 Wis. 222; *Morgan v. Bishop*, 61 Wis. 407. The only limitation upon the power of the court, in cases where it may be exercised under any circumstances, and it is conceded this case is within the statute, is that it must be in furtherance of justice. *Smith v. Smith*, 19 Wis. 522; *Morgan v. Bishop*, *supra*. That is, the power must be exercised to that end, and there must be some reasonable ground for saying that such was the motive. The only condition of the exercise of the power is that it must be on such terms as may be just in the judgment of the trial court. Necessarily, there is no rule by which the presence of the statutory motive for the exercise of the power, or the sufficiency of the condition attached to it, can be tested, except that the act and the condition must be within the bounds of reason as applied to the particular case; and there is no rule on appeal by which to test the judgment of the trial court, except that it must have some reasonable ground to support it in view of the facts, and the rule that the legal presumption is that it has such ground till the contrary is made to affirmatively appear.

What has been said, with the brief reference to the facts upon which the amendment was allowed, will furnish a basis for a right conclusion regarding the question presented.

The defendants were evidently poor people, unacquainted with legal matters. The failure to plead the defense of the statute of limitations was the mistake of their attorney. After the case had been pending for considerably more than a year, defendants concluded that their interests required the employment of other attorneys, and they acted accordingly, resulting in the substitution, for the attorney who interposed the answer, of those who now represent them. The substitution took place April 15, 1899. Three days

thereafter the amended answer was drawn. The motion for leave to file it was heard without objection for want of notice, and was granted without objection, except that "the defense of the statute of limitations cannot be set up by amendment," and that the amendment, "under the circumstances, is not permissible." We take it that the language of the objection, "the amendment under the circumstances is not permissible," was merely explanatory of the language, "the statute of limitations cannot be set up by amendment." So it will be seen that the only objection raised to the amendment was want of power in the court to permit it. All other objections were in effect waived. Counsel for appellant now concedes that the court had ample power in the premises. They could not seriously contend otherwise, since it has been so held even in tax-title cases, where a much more stringent rule prevails than in cases like this, even after a reversal on appeal. *Morgan v. Bishop*, 61 Wis. 407; *Smith v. Dragert*, 61 Wis. 222.

But it is said the court exceeded its discretionary power by granting the amendment without terms, attention being called to *Morgan v. Bishop*, where there was a reversal on that ground, and *Smith v. Dragert*, 65 Wis. 507, where affirmance was grounded on the fact that terms of the amendment were imposed. Both cases differ materially from this, in that, after a failure on one trial by a reversal in this court, a new defense was interposed by amendment. It was in regard to that situation that Mr. Justice LYON, in the *Dragert Case*, (65 Wis. 507) said, the general rule, in ordinary cases, is conceded to be that the party amending his pleading will be required to pay all taxable costs up to the time of granting leave to amend, and motion costs. Such is the rule where a new defense is set up for the purposes of a new trial, as in that case.

The statute does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend

a pleading. The whole subject, as to the justice of the amendment, and whether it shall be granted upon condition and if so what condition, is left to the sound discretion of the trial judge. The imposition of terms has a twofold object: the infliction of a penalty for the negligence requiring a remedy by the amendment; and to give to the adverse party an equivalent for the injury to him by delay or increased expense because of the amendment. Where there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for,— even the calling of adverse counsel into court for the purposes of the amendment, as was the situation in this case,— it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law. *Schaller v. C. & N. W. R. Co.* 97 Wis. 31; *Carroll v. Fethers*, 102 Wis. 436.

2. The main contention made by appellant's counsel is that the parol transfer by the first to the second occupant of the property, and his succession in possession under it, was not effectual to unite the two possessions into one continuous uninterrupted possession referable to the first entry, and existing thereafter for twenty years. We are referred to sec. 2302, Stats. 1898, which provides that, "No estate or interest in lands, other than leases for a term not exceeding one year . . . shall be created, granted, assigned, surrendered or declared unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, surrendering or declaring the same or by his lawful agent thereunto authorized by writing." It is said by way of emphasizing or in support of such contention, that the learned circuit judge expressed a personal opinion that, under such section, lands acquired by adverse possession cannot be transferred by parol; but a judicial opinion to the contrary, in harmony, as he supposed, with the decisions of this court. If that be so, we are compelled to say the learned

judge was wrong as to the holdings of this court, and counsel in error in supposing there is any such difficulty as the trial court supposed in the way of his recovering in this case. Such errors spring, from a misapprehension not only of the decisions of this court, but of the effect of an act creating privity between successive adverse possessors of property as regards the statute of limitations.

The transfer of property acquired by adverse possession is one thing, and the preservation of a condition of property as to adverse occupancy, which if permitted to continue long enough will divest the actual owner thereof of title and vest it in the adverse occupant, is quite another thing. The two things should not be confused, otherwise the statute referred to will be erroneously applied.

Title to property, acquired by adverse possession, is of the same nature as any other, and either is plainly governed by the statute as regards the manner of its transfer; but the mere fact that a person is so circumstanced, as regards realty, as to dispossess the owner thereof adversely, does not, till the expiration of the statutory limitation upon the right of such owner to reclaim that possession, vest any estate in lands, within the meaning of sec. 2302, in such possessor, nor is the substitution of another in his place, to continue the dispossession of the true owner, the transfer of any such estate. Sec. 2302, and sec. 4207, Stats. 1898, the limitation statute, are entirely independent of each other; so the essential premise upon which the argument of the learned counsel for appellant is based does not exist.

We come down to the question of whether privity can be created between successive possessors of realty, so that two possessions blended into one, continued for a sufficient length of time, will satisfy sec. 4207, Stats. 1898, which provides that, "No action for the recovery of real property or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seised

or possessed of the premises in question within twenty years before the commencement of the action." It will be noted that the plain reading of the statute, as this court has heretofore decided, is that actual occupancy of the land to the exclusion of the true owner for the statutory period, is all that is necessary to preclude such owner from thereafter reclaiming the property. *Lampman v. Van Alstyne*, 94 Wis. 417; *Wilkins v. Nicolai*, 99 Wis. 178; *Wollman v. Ruehle*, 100 Wis. 31; *Meyer v. Hope*, 101 Wis. 123. There are many other decisions, in this state and elsewhere, to the same effect, but they need not be cited here inasmuch as this court has so recently, several times, on full consideration of the subject, construed the statute.

Is a paper transfer, evidencing a change of possession by succession, necessary to blend the first possession into the second,— tack them to each other, as it is called? In that, we adhere to what was said by the court, speaking by Mr. Justice PINNEY, in *Allis v. Field*, 89 Wis. 327, and *Ryan v. Schwartz*, 94 Wis. 403, to the effect that, though the possession of several distinct occupants of land, lasting for a continuous period of twenty years, cannot be united to satisfy the limitation statute, successive possessions, each reaching to and uniting with the one that follows it, by privity between the occupants, so as to render the possession of the property continuous from the first entry to the end of the period of twenty years, satisfies the statute, and a parol transfer of possession by one to another, as the former goes out of and the latter goes into possession, satisfies the essential of privity to tack the possessions together.

The authorities all agree that privity between successive possessors is all that is necessary to render them continuous, if the possession be in fact actual and adverse. That privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry. It may be created by lease, as between

landlord and tenant, or by descent by operation of law from ancestor to heir, or by conveyance, either by parol or otherwise, from vendor to vendee. 1 Am. & Eng. Ency. of Law (2d ed.), 842, and cases cited in the notes; *McNeely v. Langan*, 22 Ohio St. 32; *Haynes v. Boardman*, 119 Mass. 414; *Witt v. St. P. & N. P. R. Co.* 38 Minn. 122; *Low v. Schaffer*, 24 Oreg. 239; *Vance v. Wood*, 22 Oreg. 77; *Crispen v. Hannavan*, 50 Mo. 536; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649; *Menkens v. Blumenthal*, 27 Mo. 198. The above cases, many of which are referred to in the briefs of counsel, are but a few of the authorities that might be cited to support the doctrine stated. It seems to be conceded by appellant's counsel that many of such authorities are directly contrary to its position, but claim is made that they do not apply by reason of the statute (sec. 2302), which, as we have indicated, does not apply to the facts of this case.

Only a few authorities that can be found are out of line with those cited. They are in harmony with elementary principles as laid down in the text-books. The doctrine is found as clearly stated, perhaps, as anywhere, in 2 Ballard, Ann. Real Prop. § 25, cited by respondents' counsel, the following language being used: "Successive possessions may be tacked together so as to form a continuous and uninterrupted possession for the essential period of time. There must be a privity existing between the parties transferring the possession. Such possession may begin in parol without deed or writing and may be transferred from one occupant to another by parol bargain and sale accompanied by delivery. All that the law requires is continuity of possession where it is actual; and this continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual delivery of the possession." The doctrine is stated in 2 Pingrey,

Real Prop. § 1193, thus: "Continuity is an indispensable element of adverse possession; but several possessions may be tacked together where they can be referred to the original entry. No paper evidence of a transfer of possession is necessary when the holding is under claim of the first entryman."

The discussion of this subject and citation of authorities might be continued to great length. It will be noted that in every treatment of the matter, whether by text writers or in judicial opinions, it is said that all that is necessary, where there is continuity of possession in fact, to connect the several parts of it, where there are such parts, so as to blend them into one term, continuous from first to last, is that there be privity between the persons as one succeeds to the other. Privity in such a case is the same as in any other, and it may be created in the same way. It is merely a succession of relationship in the same right to the same thing. 1 Greenl. Ev. §§ 189, 523; *Hart v. Moulton*, 104 Wis. 349. All that is necessary to privity between successive occupants of property, and in regard thereto, is that one receive his possession from the other by act of such other or by operation of law.

If a person, not the true owner, but hostile to him, be in actual possession of a part of a larger tract of land, under a deed describing the whole, in law he is in actual possession of the whole for the purposes of the statute of limitations, though as to a part the possession be in fact only constructive. In that situation it is said, and it is the law, that the adverse possession cannot extend beyond the calls of the deed, meaning thereby that actual possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. There was

such an occupancy in *Wollman v. Ruehle*, 104 Wis. 603, and the point was directly decided in *Bishop v. Bleyer*, 105 Wis. 330. The full legitimate effect was given in those cases to the rule that the possession under a deed cannot be extended beyond its calls. Full effect was also given to the presumption that a person so circumstanced only intends to claim what his deed calls for, and the further presumption that the land, as to which the occupant has no title, he holds consistent with the title of the true owner. The first presumption, however, was rebutted by clear proof that the occupant claimed that the disputed tract was in fact within the calls of his deed. The second was rebutted by clear proof that the possession was actual and hostile to the true owner. Such presumptions yield to proof, like any other presumption of fact, or facts otherwise established. It is the facts, when established, that govern.

Circumstances similar to those last above described were presented in *Graeven v. Dieves*, 68 Wis. 317; *Dhein v. Beuscher*, 83 Wis. 316; *Ablard v. Fitzgerald*, 87 Wis. 516; *Sheppard v. Wilmott*, 79 Wis. 15; *Elofrson v. Lindsay*, 90 Wis. 203; *Fuller v. Worth*, 91 Wis. 406; and *Ryan v. Schwartz*, 94 Wis. 403. The first of such cases ruled the others. It was there held that adverse possession of property by a person, beyond the calls of his deed, did not unite with a similar possession held by his vendee. But it will be noted that there is nothing in the opinion indicating that a written transfer of the outside property was a statutory requisite to privity between two successive possessions. The case turned on rules of evidence, applied with a severity, it must be admitted, almost precluding, in such cases, proof of the fact of privity other than by a written transfer. The *Graeven Case*, as will be seen, was misapprehended and extended by the other cases cited. However, the idea now suggested, that a written transfer is a statutory requisite to privity under sec. 2302, was not thought of.

Such stress was laid, in the *Graeven Case*, on the presump-

tion that occupation by one of premises not his own is in subordination to the title of the true owner, and the rule that adverse possession must be strictly construed and that every reasonable presumption (it will be noted that in some of the cases the word "reasonable" was left out in stating the rule) is to be made in favor of the true owner,—that such presumptions resisted the logic of facts that would seem to leave no room for a conflicting reasonable inference. Yet it is plain that the court did not there, or in the more recent cases which followed, deem the fact of privity entirely closed to proof except by a written transfer. The case did not go upon the theory that paper evidence to create privity between adverse possessions is necessary, but upon the theory that adverse possession and all facts tending to establish it must be construed so strictly in favor of the true owner that succession to actual possession of lands, a part of which was transferred by deed, though the part within and that without the calls of the instrument constitute one entire property, will not, for the purposes of adverse possession, overcome the presumption, arising from the limitations of the deed, that the vendor only transferred to his vendee possession of the land within its calls. That is out of harmony with *Wollman v. Ruehle*, 104 Wis. 603, and many other cases in other courts that might be cited. It is out of harmony with the statute that continuous disseisin for twenty years turns the presumptions against the true owner, and repeated decisions in recent years in harmony with the statute. *Wilkins v. Nicolai*, 99 Wis. 178; *Meyer v. Hope*, 101 Wis. 123; *Wollman v. Ruehle*, 104 Wis. 603. That this court did not intend to hold that a paper transfer is essential to privity between possessions for the purposes of the statute of limitations, is clear. It has not been so understood, as indicated in *Ryan v. Schwartz*, 94 Wis. 403, and *Allis v. Field*, 89 Wis. 327, where *Graeven v. Dieves* and the cases ruled by it were referred to as authority, and it was

distinctly said that a paper transfer is not essential to the tacking of adverse possessions together.

In *Dhein v. Beuscher*, 83 Wis. 316, speaking of a chain of title by successive possessions, the land being beyond the calls of the paper transfer, it was said, "The deeds fail to show privity." That was obviously correct. The deeds of themselves did not show privity as to any land except that within the calls of the deeds, but that did not prevent the fact, if it were a fact, that the property was bought as a whole,— there being an actual succession of possession pursuant to the purchase and hostile to any other right,— being of sufficient probative power to establish privity. The case most clearly out of harmony with the idea that *Graeven v. Dieves* only laid down a rule of evidence not intended to preclude a parol creation of privity between possessions, and clearly inconsistent with the idea that the essential of privity can be created by parol, accompanied by actual succession in possession, is *Ablard v. Fitzgerald*, 87 Wis. 516. There Mr. Justice NEWMAN said, speaking for the court, and to the vital point in the case: "The defendant is without a chain of paper title. It does not appear that he has a deed conveying the disputed strip to him. The disputed strip is outside the forty acres. Without such a conveyance it is difficult to see how he can connect his own possession to the possession of his predecessor so as to make the adverse possession continuous. Without a deed of the strip it seems that the defendant can claim no right to the land founded upon adverse possession of his grantor. This seems to be the effect of *Graeven v. Dieves*, 68 Wis. 317." Language to the same effect was used in *Elofrson v. Lindsay*, 90 Wis. 203, and *Fuller v. Worth*, 91 Wis. 406, but the error in those cases, without directly overruling them, was largely corrected in *Ryan v. Schwartz*, 94 Wis. 403, and such error expressly discarded in *Wollman v. Ruehle*, 104 Wis. 603, and *Bishop v. Bleyer*, 105 Wis. 330, thereby bringing the law

into harmony with what was really intended in the *Graeven Case*, and softening the rule of evidence so as to harmonize with the generally accepted doctrine on the question and the statute, both of which had been departed from.

Further discussion of the subject is unnecessary. Sufficient has been said to bring out clearly the true doctrine as understood by the court, that a paper transfer is not necessary to connect adverse possessions together; that privity, successive relationships to the same thing, is the connecting link; that a paper transfer is but a means of establishing the fact of privity, but not the only evidence; that the presumption that a person in possession of land who conveys part of it and transfers possession of the whole intended to transfer only that within the calls of his conveyance, and the presumption that a person in possession, not as owner, holds subject to the true owner, are mere rebuttable presumptions of fact that yield to any clear relevant evidence to the contrary, whether it be written, or inferential from facts established by positive evidence. *Meyer v. Hope*, 101 Wis. 123.

We might almost call the roll of the courts on that doctrine. The Missouri court said: "We know of no rule that requires written evidence to establish the fact of privity." *Menkens v. Blumenthal*, 27 Mo. 198. The Illinois court said, that where the owner, in possession of a strip of land, together with adjoining land, conveys the latter and transfers possession of the whole, and the grantee takes possession of the property as an entirety, the possession of that outside the calls of the deed being actual in both possessors, the presumptions in favor of the true owner and as to the limitations of the deed give way to the facts, and privity in adverse possession is established. *Faloon v. Simshauser*, 130 Ill. 649. The Alabama court said, that where a person holds land adversely, outside the calls of his deed, claiming a continuity of such possession from his grantor, the presumption that the latter only intended to create privity to the extent

of the calls of the deed may be overcome by proof that the former obtained possession of the property from the latter as a part of the land purchase, because a paper transfer to continue adverse possession in privity is not necessary. *Dothard v. Denson*, 72 Ala. 541. To the same effect are *Erck v. Church*, 87 Tenn. 575; and *Kendrick v. Latham*, 25 Fla. 819. A few cases, it is conceded, are out of line with the doctrine stated.

Much difficulty experienced in regard to the law of title by adverse possession will be avoided by referring and adhering to the statutes where they cover the subject, and not treating rules of evidence as rules of law. The following recapitulation of principles necessarily or incidentally referred to in this opinion may be an aid to that end:

(1) Adverse possession should be strictly construed, all reasonable presumptions being made in favor of the true owner, including the presumption that actual possession is subordinate to the right of such owner; but such strict construction and such presumptions are subject to the following limitations.

(2) Good faith by the adverse claimant as to his right at the instant of entry, or during the limitation period, is not necessary, because the statute, by its terms, only requires actual, continuous, exclusive possession under such circumstances as to wholly dispossess the true owner both actually and constructively.

(3) Actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumptions in favor of the true owner, and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites to title by adverse possession, and that the title of the adverse claimant is perfect. The statute so provides.

(4) The letter of the statute requires only such adverse possession as will continuously exclude the true owner from

possession, whether actually or constructively, during the entire limitation period; that is, so far as the letter of the statute goes, a person in possession can successfully defend such possession against the true owner when he has been entirely excluded from possession for twenty years.

(5) By judicial construction, now a rule of property, the statute does not apply unless the exclusion of the owner from possession has been during the whole period by a single hostile possession, exercised either by one or more persons acting together, or by possessions in succession connected by privity between the actors.

(6) A transfer to connect successive possessions, in conformity to sec. 2302, Stats. 1898, is not an essential to the privity necessary to continue the mere dispossessed condition of the true owner.

(7) Privity denotes merely a succession of relationship to the same thing, whether created by deed or by other act, or by operation of law. If one, by agreement, surrender his possession to another and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the time the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one, and the limitation period upon the right of such owner to reclaim the land is thereby continued, because, by the statute, as construed, the only essential to such continuity is that the dispossession of the true owner be actually continued.

(8) The calls of a deed, when title by adverse possession is claimed, limit the right as a matter of law:

(a) Where the ten-year statute, relating exclusively to claims of title founded on written instruments, is relied on;

(b) As to the extent which actual possession of a part will draw to it constructive possession of the whole;

(c) The extent to which title can be claimed by adverse possession under the instrument itself.

(9) The calls of the deed limit the right as a presumption of fact, where a person is in possession of lands outside of but adjacent to and together with lands within the calls of his deed; also where a person, being so circumstanced, by written instrument conveys the lands within such calls to another, and surrenders to such other possession of the whole.

(10) The first presumption last above mentioned yields to clear, relevant evidence showing that the possession outside the calls of the deed was not characterized by any recognition of the true ownership, whether that occur by mistake of boundaries or distinct hostile intention. The second of such presumptions yields to clear evidence that the premises were taken from a predecessor in possession as part of the property purchased, and that the two possessions so intentionally united were physically united by the successor going into possession at or before the time his predecessor went out of possession.

By the Court.—The judgment of the circuit court is affirmed.

On a motion for a rehearing counsel for the appellant contended, *inter alia*, that even a bare, naked possession of land is an interest in it, and a degree of title to it, sufficient at least to support an action of ejectment; and when such possession is accompanied by a claim of title or ownership, as Skoczek claims his was, down to the sale to *Budzisz*, and as it must have been to support the defense of adverse possession, it is not only an interest in the land, but it is title to it, and an estate in fee in it, until some one possessing a better title asserts and establishes it. *Bates v. Campbell*, 25 Wis. 613; *Swift v. Agnes*, 33 Wis. 239; *Link v. Doerfer*, 42 Wis. 394; *Hammer v. Hammer*, 39 Wis. 187; *Hacker v. Horlemus*, 74 Wis. 23; *Elofrson v. Lindsay*, 90 Wis. 203, 206; *Jones v. Bland*, 112 Pa. St. 176; *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec.

597; Adams, Ejectment, 137, 138; *Bequette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615; *Richardson v. McNulty*, 24 Cal. 348; *Hubbard v. Barry*, 21 Cal. 325; *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Jones's Adm'r v. Nunn*, 12 Ga. 472; Tyler, Ejectment, 70; Newell, Ejectment, 433, 434, and cases cited; *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738; *Pratt v. Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; 2 Bl. Comm. 196; *Jackson v. Town*, 4 Cow. 599; *Jackson v. Parker*, 9 Cow. 84; *Jackson v. Jones*, 9 Cow. 192; *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563; *Cain v. McCann*, 2 N. J. Law, 438, 4 Am. Dec. 384; *Den, Johnson v. Morris*, 7 N. J. Law, 6, 11 Am. Dec. 508; *Jackson v. Harder*, 4 Johns. 202, 4 Am. Dec. 262; *Thompson v. Burhans*, 61 N. Y. 68; *Miller v. Long Island R. Co.* 71 N. Y. 383; *New York v. Carleton*, 113 N. Y. 284; *Risch v. Wiseman*, 59 Pac. Rep. 1111; *Carleton v. Darcy*, 90 N. Y. 573; *Jackson v. Hazen*, 2 Johns. 22; *Whitney v. Wright*, 15 Wend. 171; *Hammond v. Doty*, 184 Ill. 246; *Griffin v. Spencer*, 6 Hill, 525; *Smith v. Lorillard*, 10 Johns. 356; *Day v. Alverson*, 9 Wend. 223; *Riverside Co. v. Townshend*, 120 Ill. 9; *Ricard v. Williams*, 7 Wheat. 59; *Goodwin v. Scheerer*, 106 Cal. 690; *Leonard v. Flynn*, 89 Cal. 543; *Christy v. Scott*, 14 How. 292; *Turner v. Aldridge*, 1 McAllister, 229; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; *Benefield v. Albert*, 132 Ill. 665; *Hollenback v. Ess*, 31 Kan. 88; *Douglass v. Ruffin*, 38 Kan. 530; *Redden v. Tefft*, 48 Kan. 302; *Jackson v. B. & W. R. Corp.* 1 Cush. 575; *McRoberts v. Bergman*, 132 N. Y. 73; *Tapscott v. Cobbs*, 11 Grat. 172; *Wilson v. Palmer*, 18 Tex. 592; *Adams v. Guice*, 30 Miss. 397. And not only is possession of lands title to them, at least in the first degree, and an interest in them which can be levied upon and sold under execution, which descends to the heirs of the possessor, and which will support an action of ejectment, but it is such an interest in them that a parol contract to buy or sell such possession is within the statute of

frauds and void. *Howard v. Easton*, 7 Johns. 205. A transfer of the previous estate or right is an absolute necessity to the privity of estate or right which the doctrine of tacking requires, for if the previous possessor has no title or interest he can convey none, a succeeding possessor obtains none, and there can be no privity of estate or right or interest when no estate or right or interest in fact exists.

The following opinion was filed April 27, 1900:

MARSHALL, J. It is profitable to have a case of this importance, as regards the principles involved, brought to the attention of the court a second time by a motion for rehearing based on a careful study, by eminent counsel for the losing party, of the reasons given for the judgment rendered. That course, if it does not result in any relief for the moving party, will generally bring sharply to notice any error, either of law or fact, or unsoundness of reasoning, in the opinion filed, that may otherwise remain uncorrected for a sufficient length of time to cause prejudice to the rights of parties in other litigation. If the reasons for the result first reached stand the close scrutiny of counsel, ever ready to seize upon the slightest weakness in an adverse decision as ground for further proceedings, confidence in the soundness of such decision must be materially strengthened thereby. Such has been the result in this instance.

Counsel for appellant suggest a single point, only, in the opinion of the court, wherein they confidently claim error was committed, and that such error is the very foundation stone of the decision adverse to their client. We said: "The mere fact that a person is so circumstanced, as regards realty, as to dispossess the owner thereof adversely, does not, till the expiration of the statutory limitation upon the right of such owner to reclaim that possession, vest any estate in lands, within the meaning of sec. 2302, in such possessor, nor is the substitution of another in his place, to continue

the dispossession of the true owner, the transfer of any such estate. Sec. 2302 and sec. 4207, Stats. 1898, the limitation statute, are entirely independent of each other." From that it is said that if possession of realty is an interest therein, contrary to the quoted language, then it cannot be transferred without compliance with sec. 2302.

Counsel cite to our attention numerous decisions to support the proposition that possession of land is evidence of an interest therein, and that the law will protect the possessor against hostile invasion of his possession by a wrongdoer. That is elementary. Possession is evidence of an interest in land, and of just such interest as the possessor claims, down to the mere naked occupancy by right (Newell, Ejectment, 367; *Ricard v. Williams*, 7 Wheat. 105; *Jackson v. Porter*, 1 Paine, 457), the legal presumption being that a person so circumstanced is acting by right till that is rebutted.

Judge STORY said, in *Ricard v. Williams, supra:* "Title by possession, whatever it may be, rests upon possession; and the nature and extent of that possession must be judged of by the acts and circumstances that accompany it, and qualify, explain, or control it. Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership, and seisin of the inheritance. But, it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect, by construction of law, to the acts of the party. Possession, *per se*, evidences no more than the mere fact of present occupation, by right; for the law will not presume a wrong. . . . From the very nature of the case, therefore, it must depend upon the collateral circumstances, what is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favor."

The foregoing limits the effect of possession, as evidence

of an interest in land, to possession at least presumed to be rightful. But no such interest is necessary to adverse possession under the limitation statute. That deals only with the fact of continued disseisin of the true owner for the statutory period, regardless of whether it be by a person claiming rightful possession or not. Such is the plain meaning of the statute, though, probably, till *Chicago & N. W. R. Co. v. Groh*, 85 Wis. 641, possibly till *Lampman v. Van Alstyne*, 94 Wis. 417, it was not clearly recognized.

In the last case cited it was said, in effect, that neither good-faith occupancy, in any other sense than actual hostile occupancy with intent to claim the property, nor occupancy accompanied by a claim of title or right to the property, is necessary to the running of the statute of limitations; that actual, exclusive, hostile occupancy, so as to completely dispossess the true owner, is all that is necessary.

We think sec. 2302 deals only with interests in land equal at least to the lowest title presumed by law from the fact of possession, and that, as such an interest is not necessary to the running of the limitation statute, the expression,—that the mere fact that a person is so circumstanced, as regards realty, as to dispossess the owner thereof adversely, is not an interest in lands within the meaning of sec. 2302, nor is the substitution of another in his place, to continue the dispossession of such owner the transfer of any such interest,—is correct. The expression in the opinion to that effect was followed by a statement that sec. 2302 and the limitation statute are entirely independent of each other, indicating that while mere possession, presumptively by right or with claim of right, may satisfy the former, exclusive hostile possession by a person without right, presumptively or otherwise,— by an acknowledged usurper,— will satisfy the latter. It is amply sufficient to create the condition of disseisin of the true owner, which is all the limitation statute calls for.

We are referred to the rule that a person without right cannot successfully defend his hostile invasion of the peaceful possession of another. *Bates v. Campbell*, 25 Wis. 613, is cited to that. There is no question as to the soundness of that proposition. No lawyer would dispute it. However, the mere legal right of a person who is in the peaceable, though wrongful, possession of land, to protection against the hostile invasion of that possession by a person having no better right, which exists for the purpose of peace and good order, is not an interest in land within the statute of frauds, and we find nothing in *Bates v. Campbell* indicating that it is. That case does not decide even that such mere right to legal protection is an interest in land under the statute on the subject of ejectment. The case did not go upon that theory, but upon the theory that the statute did not abrogate the common-law right to such legal protection.

Now we trust it has been made clear that, while possession with a claim, or the legal presumption, of right, is evidence of an interest in land, it only requires an actual, hostile, exclusive occupancy of land, without any presumption or claim of right, to satisfy the limitation statute; and that, as a physical continuation of that condition, without interruption sufficient to let in the seisin of the true owner, may take place by successive occupants in privity, that privity may be based on an oral authorization of the successor in possession to take the place of his predecessor. If Skoczek was not in possession of the property under a claim of right when he sold to *Budzisz*; and the latter took possession thereof under verbal permission of the former, we apprehend counsel for appellant would not venture the assertion that Skoczek could then have maintained ejectment against his vendee because the latter's permission to take possession was not in writing according to sec. 2302, Stats. 1898.

By the Court.—The motion for a rehearing is denied.

106 522
115 213

KRUEGER and others, Appellants, vs. CONE, Respondent.

February 7 — April 27, 1900.

Justices' courts: Garnishment: Payment into court: Mechanics' liens: Jurisdiction: Certiorari.

Notwithstanding sec. 3727, Stats. 1898 (providing that no judgment shall be rendered against a garnishee by a justice of the peace, or any money or property required to be delivered by him to the justice, by reason of any money owing by him to the defendant, unless it shall have become due absolutely and without depending on any future contingency, and that claims for mechanics' liens shall prevent any indebtedness from the owner being due absolutely until such liens shall have been disposed of or shall have expired), an order requiring the garnishee to pay into court the amount of the indebtedness from him to the defendant, which was subject to claims for mechanics' liens, is within the jurisdiction of the justice, and, although erroneous, cannot be reviewed upon *certiorari.*

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The respondent was served with garnishee summons at the suit of the plaintiffs against one Frank Missenski. The respondent answered that he was indebted to the defendant in the sum of $125, subject to the following situation and claims: That amount was due for digging a well on his premises; and subcontractors claimed liens upon the premises to the amount of $140.14. The principal defendant also filed an answer in the garnishee suit, in which he asserted the right of said four claimants to their liens. Thereupon the justice of the peace entered an order reciting the sufficiency of the garnishee's answer, and commanding him to pay into court the sum of $125, or deliver said money to a certain designated person to abide the further order of the court, and directing service of notice to interplead the several lien claimants, in pursuance of sec. 3723*b*, Stats. 1898, which order was objected to by the garnishee. The lien claimants

appeared, and demanded dismissal of the action as to them, for the reason that it involved the trial of a subcontractor's mechanic's lien, of which the justice had no jurisdiction. At this stage of the proceedings the circuit court for Winnebago county issued its writ of *certiorari*, reciting the representation of the garnishee that said order or judgment is void, and commanded the justice to certify said pretended judgment or order, with copy of docket and all files, papers, entries, etc., used in the proceedings in said matter. Upon the coming in of the return showing substantially the foregoing facts, the circuit court reversed and annulled that part of the justice's order which required the garnishee to pay into court or to said depositary $125, from which judgment plaintiffs appeal.

J. C. Kerwin, for the appellants.

Wesley Mott, for the respondent.

The following opinion was filed February 27, 1900:

DODGE, J. It is quite clear that the order requiring the garnishee to pay into court the amount of the conditional indebtedness from him to the defendant, which was subject to claims for mechanics' liens, was improper. Sec. 3727, Stats. 1898, being translated, provides that no judgment shall be rendered against a garnishee, or any money or property be required to be delivered by him to the justice, by reason of any money owing from him to the defendant, unless it shall have become due absolutely and without depending on any future contingency, and that claims for mechanics' liens shall prevent any indebtedness from the owner being due absolutely until such liens shall have been disposed of or shall have expired. That situation existed here, and while it existed it was not proper for the justice either to require the money to be paid over or to render judgment against the garnishee.

That, however, is not the question here presented. We

may only consider on *certiorari* whether the act complained of was within the jurisdiction of the court. Within the field of the jurisdiction of a court or a judicial magistrate the decision may be right or may be wrong and none the less not be open to review on *certiorari*. *Carter v. Dow*, 16 Wis. 298; *Varrell v. Church*, 36 Wis. 318; *Barnes v. Schmitz*, 44 Wis. 482; *Paulsen v. Ingersoll*, 62 Wis. 312. A justice of the peace has jurisdiction to decide, which involves jurisdiction to err,—a power, by the way, which is not infrequently exercised. In this procedure the justice of the peace had jurisdiction of the parties and of the subject matter of the garnishment proceeding. Within that garnishment proceeding, it was his duty to make one or other of various different judicial decisions, orders, and judgments, according as the facts might appear, either by the admissions of the garnishee or by the evidence tendered. It was, of course, the justice's duty to apply the law, whether statute or common law, to the situation thus presented to him, and he does not trespass beyond his jurisdiction merely because he either misconstrues admissions or testimony or errs in the application of the law thereto. The jurisdiction of the justice over the subject matter extends from the constructive seizure of the property by the service of the garnishee summons to the ultimate determination how it shall be disposed of,—whether the garnishee shall be discharged as not liable; whether he shall be held for one amount or another; whether he shall be compelled by contempt procedure to pay the money into court; or whether judgment, enforceable by execution against him, shall be entered. Throughout this procedure many opportunities exist for the justice to commit error and work injustice, but so long as he is within this field his acts are the acts of a court and can be reviewed only by appeal from the final judgment. The act in question was so within that field. It was either a misconstruction of the garnishee's answer, or a misapplication of the statute to the facts as

he understood them. Either was a judicial decision in the course of the garnishment proceedings, and if wrong was simply an error within a field over which he had judicial power. This being so, it cannot be corrected upon *certiorari*. The court should have quashed the writ, because, whether the order complained of was right or wrong, it was not reviewable upon that process. *State ex rel. Gray v. Common Council of Oconomowoc*, 104 Wis. 622.

By the Court.—Judgment reversed, and cause remanded with directions to quash the writ of *certiorari*.

A motion for a rehearing was denied April 27, 1900.

HILL, Appellant, vs. BUFFINGTON and another, Respondents.

106	525
110	[1]138
106	525
118	[2]492

March 20 — April 27, 1900.

Cloud on title: Tax certificate purchased by junior mortgagee: Equitable lien: Reimbursement by first mortgagee after purchase on foreclosure sale: Judgments: Estoppel.

1. The purchase of a tax certificate by a junior mortgagee amounts to the payment of the tax for the protection of the estate, and for the mutual benefit of the mortgagees and the mortgagor; and under sec. 1158, Stats. 1898, the purchaser acquires simply a "further lien" upon the land of the same nature as his mortgage and constituting simply an addition to the mortgage debt of the amount due on the certificate when he acquired it.
2. In an action to foreclose a first mortgage on real estate the complaint alleged that the premises had been sold for the taxes of 1893 and that the sale was unredeemed, but failed to allege that the lien therefor was subject to plaintiff's mortgage, or that plaintiff's mortgage was prior to the claims of a second mortgagee, although he knew that the latter held the certificate for such taxes. Judgment was entered by default, and the plaintiff bid in the premises and acquired title thereto. Subsequently he commenced an action against the second mortgagee, under sec. 3186, Stats. 1898, to set aside said tax certificate as a cloud upon his title. *Held*, that the

plaintiff was estopped from claiming that the foreclosure judgment affected the defendant's equitable rights in respect to the tax certificate.

3. Notwithstanding the fact that defendant's tax certificate was not a lien paramount to plaintiff's mortgage and, after the foreclosure of that mortgage, could not be enforced in any way, a court of equity should not set it aside as a cloud on the title except upon condition that plaintiff reimburse defendant for his expenditure by reason thereof which inured to plaintiff's benefit.

[4. CASSODAY, C. J., is of the opinion that reimbursement for defendant's expenditures by reason of the tax certificate was properly required as a condition of setting it aside, on the ground that it was a lien in equity paramount to plaintiff's mortgage.]

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The plaintiff, as owner of ten houses and lots described, brings this action to set aside the tax certificates on the sale of such lots, respectively, May 15, 1894, for the taxes of 1893, and to forever bar the defendant *Buffington*, and all persons claiming under him, from any right or title to any of such lots by virtue of such tax certificates. The facts are stipulated and found by the court, and are, in effect, as follows:

On June 1, 1892, Alexander McEachern gave to the plaintiff a mortgage on twenty lots therein described, including the lots in question, of $13,000, and the same was recorded June 8, 1892. On July 1, 1893, McEachern gave to the defendant *Buffington* a mortgage on the ten lots in question for $25,000, and the same was recorded on that day. On September 7, 1894, *Buffington* purchased the tax certificates in question on the ten lots covered by his mortgage on the sale of 1894 for the taxes of 1893, to the amount of $534.27. On September 22, 1894, *Buffington* settled with McEachern for part of his mortgage, and satisfied the same of record, and took a new mortgage thereon for $13,000. On December 21, 1894, the plaintiff wrote *Buffington* a letter, stating, in effect, that the interest due on his mortgage December 1, 1894, had not been paid, and that the taxes on the premises

for 1892, 1893, and 1894 remained unpaid, and that he was considering the question of foreclosing his mortgage, and asking *Buffington*, as such second mortgagee, to buy his mortgage. On December 24, 1894, *Buffington* replied by letter to the plaintiff to the effect that the plaintiff's mortgage was more than the full value of the property, especially in view of the plaintiff's expense of foreclosing the same, and informed the plaintiff that he held tax certificates on the lots for the sale of 1894.

In February, 1895, the plaintiff commenced an action to foreclose his mortgage, and got judgment of foreclosure and sale therein May 31, 1895, for $14,478.25. The complaint in that action alleged that McEachern, his heirs, executors, administrators, and assigns, were to pay the taxes, but had failed to pay the taxes for 1892, and the lots were sold therefor May 13, 1893, for $1,677.08, and also had failed to pay the taxes for the year 1893, and the lots were sold thereon May 15, 1894, for $824.11; and alleged that *Buffington* and other defendants therein named had or claimed to have some interest in or lien upon the mortgaged premises, or some part thereof, which interest or lien, if any, had accrued subsequently to the lien of the plaintiff's mortgage. On July 8, 1895, on the petition of the plaintiff, based on McEachern's failure to pay taxes, insurance, water rates, etc., the plaintiff obtained the appointment of a receiver to collect rents, with directions to pay taxes, assessments, water rates, etc., and did collect rents to the amount of $800. On July 28, 1896, the premises described in the plaintiff's mortgage were sold to the plaintiff on his foreclosure judgment for $10,000, which was applied as follows: Costs and disbursements, $448.10; sheriff's fees on sale, $24.10; taxes, except for the year 1893, $3,859.59; applied on judgment, $5,668.21,— total, $10,000. The total due on the judgment at the time was $15,036.30, which, after deducting the money so applied on the judgment, left a deficiency of $9,368.09.

As conclusions of law the court found, in effect, that the tax certificates so purchased and held by *Buffington* constituted a cloud upon the plaintiff's title; that the purchase of such tax certificates was in law a redemption of the ten lots in question from such tax sale of 1894 for the taxes of 1893; that such payment of such taxes by *Buffington* secured to him a lien on the land for the amount so paid additional to his mortgage; that the plaintiff's judgment of foreclosure and sale did not have the effect to extinguish such lien, but the same remained paramount to the lien of the plaintiff's mortgage and his title obtained on such foreclosure sale; that the plaintiff was estopped from asserting that such lien for such taxes had been extinguished; that the plaintiff was entitled to a decree removing such tax-sale certificates from his title upon condition that he first pay to *Buffington* the amount of the face of such tax certificates, and interest at six per cent. from the time of such purchase by him, amounting to $637.15. In default of such payment within thirty days it was ordered that a decree be entered in favor of *Buffington* declaring and establishing a lien upon such lots for the amount of his claim and costs, and that such lots be sold at public auction to satisfy the same, by the sheriff,—such sale to be advertised and conducted in the manner of sales of real estate upon execution.

The plaintiff having failed to pay as thus required, and *Buffington* having waived taxable costs, and having given due notice of the amount due, pursuant to such findings, May 25, 1899, it was ordered, adjudged, and decreed that *Buffington* do have and recover of the plaintiff $637.15, with interest thereon from January 21, 1899, at six per cent., and that such sum constituted a lien in favor of *Buffington* and against the lots described; and the sheriff was thereby directed to satisfy such lien by sale of such lots at public auction, such sale to be advertised and conducted in the manner of sales upon execution. From such judgment the plaintiff appeals.

H. P. Proctor, for the appellant.

T. F. Frawley, for the respondent *Buffington*, to the point that the plaintiff, having invoked the aid of a court of equity to remove a cloud from the title of his real estate by reason of the existence of defendant's tax certificate, will, as a condition of relief, be required to pay the amount thereof, cited *Miller v. Cook*, 135 Ill. 190, 10 L. R. A. 292; *Reed v. Kalfsbeck*, 147 Ind. 148; *Wistar v. Herting*, 27 Ill. App. 443; *Weston v. Meyers*, 45 Neb. 95; *Loney v. Courtnay*, 24 Neb. 580; *Hall v. Hooper*, 47 Neb. 111; *Morrison v. Hershire*, 32 Iowa, 271; *Clark v. Darlington*, 7 S. Dak. 148; *Mills v. Johnson*, 17 Wis. 598; *Kimball v. Ballard*, 19 Wis. 601; *Pierce v. Schutt*, 20 Wis. 423; *Hart v. Smith*, 44 Wis. 213; *Kaehler v. Dobberpuhl*, 56 Wis. 480; *Fifield v. Marinette Co.* 62 Wis. 532; *Wells v. Western P. & S. Co.* 96 Wis. 116.

WINSLOW, J. The purchase of the tax certificate by *Buffington* must, under our statute and decisions, be held to have amounted to the payment of the tax for the protection of the estate, and for the mutual benefit of both of the mortgagees and the mortgagor. *Buffington* could not thereby acquire a tax lien upon the land paramount to that of the first mortgagee, nor could he take a tax title which would cut off the first mortgagee or the owner of the equity of redemption. He acquired thereby simply a "further lien" upon the land as against the mortgagor and all persons then claiming under him; not a lien independent of his mortgage lien, or superior to it or to that of the first mortgage, but of the same nature as his mortgage, and constituting simply an addition to the mortgage debt of the amount due on the certificate when he acquired it. Stats. 1898, sec. 1158; *Burchard v. Roberts*, 70 Wis. 111. His lien by virtue of the tax certificate which he held was *apparently* paramount to the lien of the plaintiff's prior mortgage, but not *really* so. But the fact that such lien was not paramount to plaintiff's mort-

gage, and that no valid tax title could be obtained thereon, is not necessarily decisive of this case. The plaintiff has come into a court of equity, and must, upon familiar principles, do equity; and this rule applies as well to the statutory action under sec. 3186, Stats. 1898, as to the common-law action to remove a cloud from title. *Hart v. Smith*, 44 Wis. 213. By the payment of this tax by the second mortgagee the plaintiff received a distinct and substantial benefit in the protection of his lien from extinction, which could have been accomplished in no other way save by the plaintiff himself paying the tax. Is it, in any sense, equitable to allow the plaintiff to avoid the reimbursement of the defendant for the payment of this sum by which the plaintiff's title has been secured to him? We think not.

Reference to a well-established principle of equity jurisprudence as applied to the law of principal and agent will throw light upon the question. While an agent charged with the duty of caring for his principal's real estate cannot acquire a valid tax title thereto, still, if he does acquire a tax deed, equity will content itself with setting aside the tax title upon condition only of the principal's reimbursing the agent for the money he would himself have been obliged to expend to discharge the lien had the agent not acquired it, with interest thereon. *Dana v. Duluth T. Co.* 99 Wis. 663. The principal must do equity by reimbursing his unfaithful agent so far as the agent's expenditures were beneficial and necessary to protect the principal's title. The present case would apparently call for the application of equitable principles more loudly than the case of the agent, because in the agent's case there is an attempted fraud and breach of trust, which element is entirely lacking in the case before us.

It was strongly argued, however, that the defendant was barred from making any claim by the judgment of foreclosure of the plaintiff's mortgage, because the defendant was made a party to that action and the judgment therein

contained the usual provision cutting off the defendants from all right, title, interest, or equity of redemption in the mortgaged premises. This presents a question of some difficulty, but we think that, under any proper construction of the judgment in the light of the allegations of the complaint, it cannot be said that the question of the equitable rights of the defendant in respect to the tax certificate in question is affected by that judgment. Probably it could have been litigated in that action, and, had the complaint therein alleged that the defendant's interest under the tax certificate was subject to the plaintiff's lien, or merely rested with the usual allegation as to defendant's claims being subordinate to that of the plaintiff, and had the judgment above referred to been rendered upon such a complaint, it would be hard to see why the defendant's rights would not have been barred. But the complaint not only failed to allege that the defendant's tax lien was subject to the plaintiff's mortgage, or to rest on the usual allegation as to priority of the plaintiff's mortgage over defendant's claims, but industriously alleged that the mortgaged premises had been sold for the taxes of 1893 (being the taxes in question), and that the sale was still unredeemed, although the plaintiff then knew that the defendant held the certificate; thereby seemingly recognizing the tax certificate as representing an existing tax lien on the property. This was certainly affirmative notice to the defendant that his claim for taxes paid was not attacked in that action, and doubtless the defendant let that action go to judgment by default relying on this plain recognition of the apparently existing tax lien. In view of this allegation of the complaint, we think that the judgment must be construed simply as cutting off the defendant's second mortgage lien, and not as affecting the question of the taxes, or clothing him with the right to demand of a court of equity the removal of the apparent cloud on his title, consisting of the uncanceled certificate, although, as

before stated, the tax lien, as well as the second mortgage lien, had ceased to exist. Plain principles of estoppel would seem to prevent the plaintiff from now claiming that his judgment by default cuts off a claim which he expressly recognized and accepted in his complaint. The judgment must be construed as referring to such rights and interests of the defendant as were litigated in the action, or might properly have been litigated under the pleadings. *Pelton v. Farmin*, 18 Wis. 222; *Gilchrist v. Foxen*, 95 Wis. 428.

Furthermore, the relief granted by a default judgment cannot exceed that demanded by the complaint.

Upon the whole case the judgment is right and must be affirmed, irrespective of the fact that *Buffington* has no lien on the property that could be enforced under his mortgage or otherwise, but merely controlled a situation clouding the plaintiff's title, which cloud, under the circumstances, a court of equity might properly refuse to remove except upon condition that the party invoking and receiving its aid do equity to *Buffington* by reimbursing him for an outlay which inured to his benefit.

By the Court.— Judgment affirmed.

CASSODAY, C. J. I heartily concur in the affirmance of the judgment in this case, and much that is said in the opinion of my brother WINSLOW; but I am unable to understand some of the reasoning by which such conclusion is reached. If the tax certificates held by *Buffington* were not liens upon the land "superior to the plaintiff's first mortgage;" if they were only "apparently paramount to the lien of the plaintiff's prior mortgage, but not *really* so;" if "the tax lien, as well as the second mortgage lien, *had ceased to exist*,"— then I am unable to perceive any ground, legal or equitable, for holding that the plaintiff should repay to *Buffington* what he had advanced for such tax certificates, and interest thereon, as a condition of setting them aside as

clouds upon his title. If those things were all so, then I am unable to perceive how those tax certificates gave *Buffington* "a further lien upon the land." If the purchase of such tax certificates gave *Buffington* no lien upon the land "independent of his mortgage lien," but only a lien "of the same nature as his mortgage, and constituting *simply an addition to the mortgage debt* of the amount due" on the certificates when he acquired them, then I am unable to perceive why the foreclosure and sale under the plaintiff's prior mortgage, which it is conceded cut off *Buffington's* subsequent mortgage, did not also cut off his mortgage debt, including what he so paid for such tax certificates, thus said to be an addition to the mortgage debt.

The sense in which the word "lien" has been used may account for some of the differences of opinion, and perhaps some confusion in the discussion of the question. If it is used in the sense that when *Buffington*, as such mortgagee, purchased such tax certificates they continued as liens at law, drawing the high rate of interest as such certificates, entitling him to tax deeds, with the right to enforce the same, then I apprehend that under the decisions of this court all would agree that such tax certificates were not such liens. But if it is used in the sense that such tax certificates were liens superior to the plaintiff's mortgage, but cognizable only in a court of equity,—as I think they were,—then, as it seems to me, the judgment in favor of *Buffington* was eminently proper and should be affirmed. But, if such certificates were not liens in equity superior to the plaintiff's mortgage, then I see no reason why they should not be set aside without the condition of repayment.

Our statutes did not, in my judgment, prevent such tax certificates from continuing to be liens in equity paramount to the plaintiff's mortgage. The original statute authorized any person who had a lien by mortgage upon any lands on which the taxes had not been paid to "*pay such taxes*, and

the interest and charges thereon," and that the *tax receipt taken therefor* should "constitute an additional lien on such land, to the amount therein specified and the interest thereon; and the amount so paid and the interest thereon" should "be collectible with, as part of, and in the same manner as, the amount secured by the original lien." Sec. 116, ch. 15, R. S. 1849; sec. 161, ch. 18, R. S. 1858. By ch. 123, Laws of 1860, the statute upon the subject was modified so as to read substantially as found in the revisions of 1878 and 1898, secs. 1158, 1160. It will be observed that the original statute only constituted the receipt for taxes "paid" by such mortgagee "an additional lien," etc. The amended statute gave a "further lien," not only for taxes paid, but also for money paid to redeem the mortgaged premises from tax sales. The manifest purpose of the first of these sections was to secure to such original lienholder the repayment of any money he might voluntarily expend in paying any taxes on such real estate, and also any money he might voluntarily pay to redeem such real estate from tax sales, with interest upon the amounts so expended and paid, as prescribed, and giving him a lien therefor upon the land, as stated. In the absence of such statute, such original lienholder might not have been able to recover back the money so *voluntarily* paid and expended, especially in the absence of any agreement to that effect in the mortgage or instrument creating the original lien. The manifest purpose of the other section was to prevent the original lien from being "discharged as to the persons mentioned in sec. 1158 until the money thus paid for taxes, charges, interest, or redemption, with interest thereon as aforesaid," should first be "repaid," and to authorize such original lienholder to recover the amount so paid and expended, and the interest thereon, in any judgment obtained by him to enforce his original lien. It will be observed that neither of these sections mentions tax certificates purchased or obtained by any

such original lienholder, nor tax deeds taken thereon by such original lienholder. The rights of the mortgagee, as the purchaser and holder of such tax certificates, are by the statutes to be determined by equitable principles as at common law. In New York it has been held that, "In the absence of any special covenant to that effect, a mortgage imposes no duty upon the mortgagee to protect the interests of the mortgagor, and the former is not prohibited from acquiring an adverse claim to or lien upon the mortgaged premises, and from enforcing it with the same effect as a stranger might." *Cornell v. Woodruff*, 77 N. Y. 203, 205, 206. That case followed *Williams v. Townsend*, 31 N. Y. 411. This last case seems to have been expressly approved by Chief Justice DIXON in *Sturdevant v. Mather*, 20 Wis. 585, 586, but it was not essential to the decision of that case. In the same volume it was held that: "Where a second mortgagee of land purchases on foreclosure of his mortgage, he cannot acquire *an absolute title, free from the lien of the first mortgage*, through an assignment to him of an outstanding tax certificate, and a deed issued thereupon. . . . Such assignment (whether made before or after the foreclosure sale) must be regarded, *prima facie*, merely as a redemption of the land from the tax sale." *Smith v. Lewis*, 20 Wis. 350. To the same effect, *Fisk v. Brunette*, 30 Wis. 102; *Lybrand v. Haney*, 31 Wis. 230. These decisions are based upon the general principles of equity, and are in no sense governed by the statute. The general rule is that the mortgagee is protected, in equity, in the payment of taxes and assessments upon the mortgaged premises. 2 Jones, Mortgages, § 1080.

Counsel for the plaintiff seemingly rely upon a Michigan case, where the mortgagees, after having redeemed the mortgaged premises from a tax sale, foreclosed their mortgage, and bid in the land for the amount due on their mortgage, without any reference to what they had paid to redeem the

land from the tax sale. Thereupon the mortgagor redeemed from the foreclosure sale, and thereafter such mortgagees filed a bill in equity to enforce a claim against the land for what they had so paid to redeem the land from the tax sale. In refusing the relief prayed for, Mr. Justice COOLEY, in behalf of the court, said: "All that complainants could claim by virtue of the mortgage they were bound to claim in those proceedings, and they could not, at pleasure, *split up their demand*, and make the parts the subjects of separate suits." *Vincent v. Moore*, 51 Mich. 619. That decision was not based upon any statute, but upon a well-recognized principle of the common law. The same is true of the Missouri case relied upon,—*Horrigan v. Wellmuth*, 77 Mo. 542, 545, 546. While it was there held that the claim of the mortgagee who had paid taxes "must be enforced as a part of the mortgage debt, and not by an independent action against the mortgagor as for money paid to his use, or under claim of subrogation to the lien of the state or municipality," yet it was there further held that "payment of the debt secured by a mortgage will not extinguish the lien of the mortgage as a security for taxes properly paid by the mortgagee." The court said: "It appears that the amount of the mortgage debt was paid to the plaintiff by the defendants on December 19, 1877, but it does not appear that any release has ever been executed, or that any entry of satisfaction has ever been made; and we think it quite clear that, as the mortgagee was entitled to receive the original debt, interest, and taxes before the defendants could demand an entry of satisfaction or a release, the simple payment of the debt and interest, without more, would no more extinguish the mortgage than the payment of the debt and taxes, without the interest, would extinguish it.

Where a person having a lien or interest in or title to land acquires a tax certificate or other lien upon the same land, and justice and good conscience require it, it is the

business of a court of equity to preserve such lien and prevent its merger into the higher title or interest. *Webb v. Meloy*, 32 Wis. 319; *Morgan v. Hammett*, 34 Wis. 514, 524; *Aiken v. M. & St. P. R. Co.* 37 Wis. 469; *Scott v. Webster*, 44 Wis. 185; *Gilchrist v. Foxen*, 95 Wis. 428, 440.

For the reasons given I think the judgment of the superior court of Douglas county should be affirmed.

ALVORD, Appellant, vs. LUCKENBACH, Respondent.

April 6 — April 27, 1900.

106	537
112	[1]590
106	537
d118	[1] 93
106	537
115	[1]564
c116	[1]213

Life insurance: Change of beneficiary: New contract: Assignment.

1. Under a tontine life insurance policy payable to the executors, administrators, or assigns of the assured, and giving him no power to designate a different beneficiary, he can confer no rights upon any one except by assignment; and in order to create a new and specific beneficiary a new contract with the insurer is necessary.
2. Under such a policy a letter from the insured to the company requesting it to make the insurance payable, in case he died before the policy matured, to certain designated persons, did not amount to an assignment of the policy to such persons, and, in the absence of assent on the part of the company, conferred no rights upon them to demand payment of the insurance.

APPEAL from an order of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

Appeal by plaintiff from order sustaining demurrer to his complaint, wherein the following material facts are set forth: Prior to November 19, 1895, the plaintiff's father, Charles B. Alvord, held a tontine life insurance policy for $3,000, payable to Ellen C. Alvord, beneficiary, wife of Charles B. Alvord, provided that, if said beneficiary should not survive the insured, then such payment should be made to the executors, administrators, or assigns of said assured. Ellen C. Alvord having died, said Charles B. Alvord, on

November 19, 1895, sent a letter to the company, mentioning the death of his wife, and saying: "Now, I wish you would make it payable, in case of my death before maturity, to the following named persons, just as I have them wrote: *Adelbert Alanson Alvord*, $1,000," etc. No response was made to this letter, and Charles B. Alvord died November 30th following. The defendant was appointed administrator of the estate of Charles B. Alvord, and received upon the policy $2,700, being the amount thereof, less $300, which the assured had borrowed from the company. The complaint concludes with the assertion that said defendant, in receiving said $2,700, received $1,100 thereof for the plaintiff, *Adelbert A. Alvord*, and thereby became indebted to him, but has refused to pay said amount upon demand.

The cause was submitted for the appellant on the brief of *Sawyer & Waite*, and for the respondent on that of *E. L. Chloupek*, attorney, and *Classon & Brazeau*, of counsel.

Dodge, J. Several reasons are urged in support of the conclusion of the court below that no cause of action is stated by the complaint in favor of the plaintiff and against the defendant. Discussion of the others will be rendered unnecessary by the conclusion we have reached upon the fundamental consideration which goes directly to the rights of the plaintiff, not only in this form of action but in any other as well.

By the contract between the insurance company and the plaintiff's father, Charles B. Alvord, the former agreed to pay the amount of the policy to the latter's executors, administrators, or assigns. This contract existing, no rights could be conferred upon any one by Charles B. Alvord except by assignment. It was no part of the contract that he might designate a beneficiary, so that the class of cases last illustrated in this court by *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, holding completed consent of insurer not essen

tial to the vesting of rights in an appointee, have no application. In order to create a new and specific beneficiary, a new contract was necessary, and it is not and could not be contended that such was made.

In order to constitute an assignment, it is essential that the dominion and control of the assignor over the assigned fund should be terminated. *Dirimple v. State Bank*, 91 Wis. 601, 606. Especially is this a requisite where the assignment is wholly without consideration, and merely a donation.

A glance at the letter set forth in the statement of facts, upon which the plaintiff predicates all his rights; suffices to satisfy the reader not only that no such effect was accomplished, but that none was intended by Charles B. Alvord. That letter is no more than a request to the insurance company to enter into a new contract with the assured, whereby various persons shall be beneficiaries. If it had been assented to, and the new contract made, the dominion of Charles B. Alvord over the ultimate rights to the money would not have been cut off. He would still have had power during his lifetime either to surrender and cancel the policy, to assign it, or, with the consent of the insurer, to have made still another modification as to the beneficiaries. *Foster v. Gile*, 50 Wis. 603; *Breitung's Estate*, 78 Wis. 33; *Strike v. Wis. O. F. M. L. Ins. Co.* 95 Wis. 583. From such a request no inference can be drawn of any purpose to part with the dominion and control over the disposition of this fund during his lifetime. The conclusion is therefore irresistible that no rights whatever had been conferred upon the plaintiff to demand the payment of any part of this insurance fund to him, and that the insurance company was still bound by its contract to pay to the executor or administrator of Charles B. Alvord, he not having assigned the same. The complaint fails to show any right of recovery in the plaintiff, and demurrer thereto is properly sustained.

By the Court.— The order sustaining the demurrer is affirmed.

BLONDE, Respondent, vs. THE MENOMINEE BAY SHORE LUMBER COMPANY, imp., Appellant.

April 6 — April 27, 1900.

(1, 2) *Appeal: Vested rights: Change in remedy.* (3) *Logs and timber: Liens.*

1. Upon the dismissal of an appeal for lack of the certificate required by sec. 3047, Stats. 1898, in case of a judgment involving less than $100, the rights of the parties did not become vested or finally determined so as to preclude another appeal.
2. It was competent for the legislature to dispense with the requirement of such a certificate, even as to judgments entered prior to the change.
3. The owner of land had contracted to sell and deliver the hemlock logs cut therefrom to one person and the other logs to another. Plaintiff worked for said owner promiscuously, as might be convenient, upon both classes of logs before their delivery. *Held*, that his lien for the whole of such labor might be enforced against any part of the logs.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Eastman & Martineau*, and for the respondent on that of *Quinlan & Daily*.

CASSODAY, C. J. This action was commenced in a justice's court March 15, 1898, against the defendant Anderson, to recover $125.90 remaining due and unpaid to the plaintiff from Anderson for work, labor, and services performed by the plaintiff for Anderson between November 16, 1896, and February 27, 1897, upon 222,000 feet of hemlock logs, 115,000 feet of basswood, birch, and elm logs, 45,000 feet of cedar logs, and 10,000 feet of black-ash logs. The logs were all cut and taken from Anderson's land, and put in and delivered by him. Anderson had previously contracted to sell and deliver the hemlock logs to one Spies, and all the other logs to the *Menominee Bay Shore Lumber Company*. In this

action the sheriff attached only 75,000 feet of the logs so delivered by Anderson to the *Bay Shore Lumber Company*, the same being on the bank of the river; the logs so delivered to Spies being out on the ice. After judgment before the justice, the *Bay Shore Lumber Company* intervened, and tendered and paid into court $60.29, as covering so much of the plaintiff's claim as was for his work, labor, and services on the logs so delivered to it by Anderson, with $27.96 for costs and disbursements incurred in that suit to that date, and appealed to the circuit court from that part of such judgment which declared that the plaintiff's claim was a lien on the logs so delivered to it in excess of the amount so tendered.

At the close of the trial in the circuit court it was held by that court that the facts were, in effect, as stated, and that the allegations of the plaintiff's complaint were all true, and that the plaintiff was entitled to judgment for the full amount of his claim against Anderson, and that the same was a lien upon the logs so attached, and judgment was ordered to be entered accordingly. From the judgment so entered May 4, 1898, for $152.37 damages and $48.03 costs, the *Bay Shore Lumber Company* appealed to this court December 8, 1898. That appeal was dismissed because the amount involved was less than $100, and there was no certificate as then required by the statute (sec. 3047, Stats. 1898). *Blonde v. Menominee B. S. L. Co.* 103 Wis. 284. Upon the *remittitur* being filed in the trial court, the *Bay Shore Lumber Company* again, and on July 13, 1899, appealed from such judgment to this court.

The reason for taking the second appeal from the same judgment without such certificate is that, just prior to the dismissal of the first appeal by this court, the section of the statute cited was amended by dropping out of that section all that prohibited appeals "when the amount involved, exclusive of costs, is less than $100," without such certificate.

Ch. 63, Laws of 1899. The plaintiff insists that his rights became vested and finally determined upon the dismissal of the first appeal. But the *Bay Shore Lumber Company* at no time lost its right to appeal,— much less, a writ of error. Sec. 21, art. I, Const.; *Bumbalek v. Peehl*, 95 Wis. 127; *Baier v. Schermerhorn*, 96 Wis. 372. The only difficulty with its first appeal was a mere failure to comply with such statute then in force, but since repealed, requiring such certificate. But the plaintiff had no vested right in having the mode of taking the appeal remain as it was when the judgment was entered. It is well settled that "the legislature may alter or vary existing remedies as they please, provided that in so doing their nature and extent is not so changed as materially to impair the rights and interests of the parties." *Von Baumbach v. Bade*, 9 Wis. 560; *Second Ward S. Bank v. Schranck*, 97 Wis. 265, 271. We must hold that it was competent for the legislature to dispense with such certificate in taking an appeal, even from such prior judgment.

It is contended that because the plaintiff at first worked for about two weeks skidding the hemlock logs, before he commenced drawing any, and because Anderson had contracted to deliver those logs to Spies, and by a separate contract had agreed to deliver the other logs to the *Bay Shore Lumber Company*, the plaintiff can have no lien upon such other logs for the work he did upon the hemlock logs,— in other words, that the plaintiff could only enforce a lien against the logs so delivered by Anderson to the *Bay Shore Lumber Company* for such work as he did upon those logs, and that he could only enforce a lien, if any, for such work as he did upon the logs so delivered by Anderson to Spies, against those logs. In support of such contention, counsel rely on two cases in this court: *Losie v. Underwood L. Co.* 79 Wis. 631, and *Minton v. Underwood L. Co.* 79 Wis. 646. In the first of these cases it clearly appears that the plaintiff had spent a certain number of days, for which he had charged

the defendant, in driving logs belonging to a different party down to the point where the defendant's logs were; and it was held error to refuse an instruction that the plaintiff could not enforce a lien against the defendant's logs for such work so performed upon the logs of the other party. The other case is quite similar in its facts. The case at bar is clearly distinguishable. Here the logs were all cut by Anderson from his own land, and delivered by him, on the bank of the river or on the ice, either to Spies or the *Bay Shore Lumber Company*. The plaintiff worked, promiscuously, on one class of logs or the other, as might be convenient; but he worked continuously, and all his work upon the logs was performed for Anderson, and while the logs were in the possession of Anderson, and before they were so delivered by him to the respective parties named. The facts bring the case squarely within the rule declared in *De Morris v. Wilbur L. Co.* 98 Wis. 465, to the effect that "a person holding a lienable claim, under the laws of this state, for work done on logs, timber, or lumber, may enforce collection of the entire claim out of any part of the property subject to such lien."

By the Court.—The judgment of the circuit court is affirmed.

MONTGOMERY, Executor, Appellant, vs. THE AMERICAN CENTRAL INSURANCE COMPANY and others, Respondents. 106 543 s106 155

April 6 — April 27, 1900.

Appeal: Notice: Separate judgments against insurance companies.

The "separate" judgments entered pursuant to sec. 2609*a*, Stats. 1898, against the defendants in a consolidated action upon insurance policies issued by different companies, cannot be brought up for review by a single notice of appeal.

APPEAL from judgments of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Appeal dismissed.*

This is a consolidated action upon six policies of fire insurance issued by five different companies upon certain buildings owned by plaintiff's testatrix, which were afterwards burned. Separate actions were originally commenced against the different companies, but they were afterwards consolidated, and all tried together as one action, under the provisions of secs. 2609*a* and 2792, Stats. 1898. It appeared upon the trial that, after the insured buildings had been destroyed by fire, the plaintiff's testatrix entered into written agreements, identical in terms, with each of the defendant companies, providing for appraisal of the loss by two appraisers and that their award should be final and conclusive as to the amount of the loss. The appraisers made their awards, and each of the defendant companies tendered the plaintiff's testatrix its proportionate share of the loss so appraised, but the tenders were refused and these actions commenced. After the action was brought, each of the defendant companies served a written offer of judgment for its proportionate share of the appraised loss, with costs (under sec. 2789), but the offers were not accepted. The court submitted to the jury only the question as to the amount of the loss, deeming there was no other question of fact in the case, and the jury found the loss to be considerably in excess of the award of the appraisers. Afterwards the court held that the award made by the appraisers was final and fixed the plaintiff's entire loss, and rendered a separate judgment against each company for its proportionate share of the award, but not including any costs in favor of plaintiff, and less all costs of each defendant since the time of the offer. From all of these judgments the plaintiff attempted to appeal by giving a single notice of appeal and a single undertaking.

For the appellant there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin*.

For the respondents there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. D. Van Dyke*.

WINSLOW, J. This case was fully argued, and it is unfortunate that we are unable to decide it upon the merits, but we are met with an objection upon the threshold which necessitates dismissal of the supposed appeal. This court has uniformly held that two judgments cannot be brought to this court by a single notice of appeal, and that such an appeal must be dismissed because the statute does not authorize it. *White v. Appleton*, 14 Wis. 190; *Ballou v. C. & N. W. R. Co.* 53 Wis. 150. So far as judgments are concerned, this rule was not affected by the provisions of sec. 3042*a*, S. & B. Ann. Stats. (now incorporated in sec. 3049, Stats. 1898), because that statute simply allowed two or more appealable orders in an action to be brought up for review by one notice and undertaking, either with or without the judgment. So the question here is simply whether there is one judgment in the present action or five judgments. Upon this question there seems to be no room for doubt. The statute authorizing the joining in one action of claims against several insurance companies for loss arising from the destruction of property by fire (Stats. 1898, sec. 2609*a*) provides that "a *separate* judgment shall be rendered against each company for the sum for which it is found to be liable," together with its proportion of taxable costs. Language could hardly be used which would more clearly indicate that the joinder of actions is simply for the purpose of avoiding the trouble and expense of separate trials, but that after the trial, if the plaintiff recovers, he obtains a separate and distinct judgment against each company. *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46.

Being separate judgments, they cannot, under the rule above stated, be brought here by one notice of appeal.

By the Court.— Appeal dismissed.

106 546
109 154
109 412
106 546
111 [7]652
106 546
112 [2]142
55 LRA 755n
55 LRA 778n
106 546
116 [1]167
116 [6]178
116 [3]509
61 LRA 925
61 LRA 928
106 546
d117 [2]377
c117 [2]381
e117 [2]388

KILLEN, Appellant, vs. BARNES, imp., Respondent.

April 6 — April 27, 1900.

Corporations: Action by creditors: Equity: Banks and banking: Duties and liabilities of officers: Trusts: Survival and assignment of actions: Liabilities of stockholders: Voluntary payment: Voluntary assignment.

1. A creditor of a corporation, under secs. 3237, 3239, Stats. 1898, if, looking to the interests of its creditors, the ends of justice require or the court direct, may maintain an action in equity to redress wrongs to such corporation growing out of the misconduct of its officers, resulting in loss or waste of the corporate assets.
2. If the officers of a banking corporation misrepresent its condition, whereby a person is led to deposit his money therein and lose it, by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, only upon the ground of deceit.
3. An action for damages for deceit does not survive at the common law, nor under any statute of this state, and therefore is not assignable.
4. Sec. 4253, Stats. 1898, which provides that actions for damages done to real and personal estate shall survive, refers only to damages to specific property, not to cheats and frauds resulting in pecuniary loss.
5. There is no trust or fiduciary relation between the creditors of a banking corporation and such corporation or its officers. Such relation exists between such officers and the bank, but that between the bank and its creditors is merely the relation of debtor and creditor.
6. The trust-fund doctrine, so called, under which it is held in some jurisdictions that officers of a bank are liable directly to its depositors as *quasi* trustees, does not prevail in this state.
7. Officers of a bank are liable to it for official misconduct resulting in loss or waste of its property, and, as a fiduciary relation exists between such officers and the corporation, such liability survives and is assignable; and the result of that doctrine is that all such liabilities pass to an assignee for the benefit of creditors by a general assignment of its property for that purpose.
8. If the stockholders of an insolvent bank that has made an assignment for the benefit of its creditors, voluntarily pay into the trust fund thus created the full amount of their double liability created

by law, and such additions to such fund be distributed to and received by the creditors according to their right to participate in the benefits of such liability, it is thereby discharged.

9. Liabilities for unpaid subscriptions to the capital stock of a corporation pass to an assignee under a general assignment of its property for the benefit of its creditors, and they cannot participate therein in any other way than by becoming parties to such assignment.

10. An assignment by an insolvent corporation, for the benefit of its creditors, does not constitute an action for the enforcement of liabilities of its stockholders for unpaid subscriptions to its capital stock.

11. Sec. 1755, Stats. 1898, relating to the liability of stockholders of a corporation to its creditors, can be invoked only by creditors existing at the time of the commission of the act upon which the liability depends, and to the extent the capital stock is diminished by such violation.

12. The joint and several liability of the directors of a corporation for all of its indebtedness under sec. 1765, Stats. 1898, resulting from a violation of its provisions respecting the payment of dividends, is penal in character. A right to the benefits of it does not survive at the common law or by any statute of this state, and is not assignable.

13. The rule stated in *North Hudson B. & L. Asso. v. Childs*, 82 Wis. 460, respecting the degree of care the officers of a corporation owe to their principal, affirmed under the doctrine of *stare decisis*.

14. Where the interests of all creditors who desire to invoke equity jurisdiction to enforce liabilities of officers and stockholders of a corporation are trifling in amount, or there is no good reason appearing why such interests cannot be adequately protected otherwise than by means of the exercise of such jurisdiction, the court may properly deny any right thereto.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

Plaintiff, as assignee of a claim established against an insolvent banking corporation whose affairs were in process of being settled under a voluntary assignment for the benefit of creditors, commenced this action to recover it of the stockholders and officers of the bank because of the stock-

holders' liability and official misconduct of such officers. The court decided the issues of fact, in effect, as follows:

The First National Bank of Manitowoc was organized in 1865 and went out of business by being succeeded by the State Bank of Manitowoc June 2, 1892, which latter bank took all the assets of the national bank and assumed its liabilities. C. C. Barnes was the president, Charles Luling the cashier, and for the greater part of the time George B. Burnett was the bookkeeper and cashier of the national as well as the state bank, and they exclusively managed such banks. *John W. Barnes* purchased $2,000 of the stock of the national bank, paying par value therefor in cash, in 1886, and continued to hold it till the bank was succeeded by the state bank as hereinafter set forth. During the time *John W. Barnes* was a stockholder as aforesaid he was one of the directors of the bank and its vice-president, but did not actively participate in conducting the business of the corporation or do anything in that regard except to sign some reports to the comptroller of the currency, represented to him to be correct by the other officers named, and by verifying such reports, or some of them, by the books. C. C. Barnes, Charles Luling, and George B. Burnett all died insolvent before this action was commenced. The reputed and published capital of the bank, from the time of its organization, was more than its actual capital. Prior to 1882 the books of the bank were falsified so as to show $60,000 of deposits, evidenced by outstanding certificates of deposit, less than the true amount, but neither that fact nor the fictitious character in part of the bank capital was known to *John W. Barnes* till the suspension of the successor.

In 1891 the bank held $60,000 of paper of the Howell Lumber Company which it had taken through Chicago banking correspondents, supposing they held collateral security therefor. The lumber company failed at the time stated and the comptroller of the currency, supposing the event

would necessarily cause such a loss to the bank as to absorb its surplus, reported at $16,000, and $10,000 of its capital, ordered a ten per cent. assessment on the stock, to be carried, however, on the books of the bank as accounts receivable till the amount of loss on the Howell paper could be more definitely known.

The official bank examiner had regularly examined the affairs of the bank from the time of its organization, yet had failed to discover but that the capital of the bank and its surplus were actual, as reported to the comptroller's office, or to discover anything to criticise in the management of the bank. The books showed, as above indicated, when the assessment was ordered, that the bank had a full paid up capital of $50,000, a surplus of $16,000, and no paper condemned by the comptroller except the Howell paper, and none other on which it was supposed there would be a loss. All the paper of the bank, including the Howell paper, was supposed to be good when taken, and was taken in the regular course of business. Nothing impairing the safety of the bank was brought to the attention of *John W. Barnes*, except the loss on the Howell paper, and there was no way of his determining that the situation of the bank was other than what its books indicated, except by a careful and extraordinary investigation of its affairs — such an investigation as would not be undertaken or suggested by a director of a bank without some well-grounded suspicion of dishonesty of the persons in the immediate charge of its affairs.

When the assessment was ordered *John W. Barnes* owned twenty shares of the capital stock of the bank, Fayette Armsby twenty shares, and J. F. Pritchard sixty shares, all of whom were entirely ignorant of the bank's true condition or of anything affecting its safety, other than the loss on the Howell paper. The balance of the stock was owned by the managing members of the corporation before indicated, C. C. Barnes, Charles Luling, and George B. Burnett. Such

active members, upon the comptroller of the currency ordering the assessment, proposed to the other stockholders that an assessment of twenty per cent. upon the stock should be made; that each stockholder should give his note for the amount of his assessment; that the assessment should be reported to the comptroller of the currency, and measures be immediately taken to organize a state bank to succeed the national bank, and that the affairs of the national bank should be liquidated through the means of the new organization. In support of their proposition to change from a national to a state bank, the managing members of the corporation said, among other things, that the comptroller of the currency was too cautious, that an assessment on account of the Howell paper was unnecessary as it would all be collected, and that by changing to a state bank they would have greater liberty of action in accommodating their customers and handling their business.

The result was that all of the stockholders agreed to the proposed assessment and change. A certificate of organization of the new bank was accordingly made and signed by all of the stockholders of the old bank except Armsby, who was absent, but who thereafter consented to the arrangement. The law was fully complied with in respect to the formation of a state bank. No subscription for stock was made other than by signing the certificate of organization, or money paid for stock other than what was represented in the assets of the old bank, or certificate of stock issued. Each stockholder of the old bank was treated as having an equivalent interest in the new organization, each stockholder, outside of the managing officers, supposing that his interest in the assets of the national bank was a full equivalent for a like interest in the new bank; and the stock of the new bank was treated as fully paid by the interests of the stockholders in the assets of the old bank.

The new corporation was organized January 2, 1892, by

electing as officers and directors the same persons who held such positions in the national bank. The assets of the national bank were turned over to the new corporation in consideration of its assuming the liabilities of the national bank. Soon thereafter C. C. Barnes informed *John W. Barnes*, Armsby, and Pritchard that the Howell paper had been fixed up, so that payment of the notes given for the assessments on stock, in anticipation of loss on such paper, would be unnecessary, and gave back their notes, which they received relying on the statement of C. C. Barnes as true.

At one time *John W. Barnes*, C. C. Barnes, and J. F. Pritchard each gave his note to the bank for $15,000 taking a certificate of deposit therefor, that being done to make the published reports of the bank appear favorable with those of a competing bank. Such transaction did not result in any loss to the bank or to its creditors. The national bank, for a long time before it went out of business, was insolvent, and the new bank was likewise insolvent, from the beginning to the end.

There was a studious and successful attempt on the part of the active members of the banks to prevent the other stockholders from knowing the facts in regard to the financial situation and to cause such stockholders to believe that the banks were safe and prosperous. One of the means resorted to by the management of the national bank was to vote a dividend occasionally, ostensibly out of the earnings which appeared on the books to be available therefor, and to pay the same only to the outside stockholders. The same thing was done June 17, 1893, in the new organization. At a meeting of which *John W. Barnes* was not notified and of which he and the other outside stockholders were ignorant, a seven per cent. dividend was voted, none of which was paid except to such outside members. They received of the dividend as follows: *John W. Barnes* $140, Fayette Armsby $140, J. F. Pritchard $420.

Prior to the making of the dividend of seven per cent. as aforesaid Robert T. Blake deposited $1,000 in the bank and took its certificate of deposit therefor, and after such dividend was paid he made a like deposit, taking a certificate of deposit as before, both of which certificates he held June 5, 1893, at which time the bank made an assignment to *John W. Barnes* for the benefit of its creditors. Thereafter Blake duly proved his claim in the assignment proceedings, and thereafter he and his assignee, the plaintiff, shared in all distributions of the assets of the bank and collections made by the assignee of the bank on account of the liability of the stockholders thereof to creditors on account of the dividend of seven per cent. paid as aforesaid.

Shortly after the assignment *John W. Barnes* increased the trust fund in his hands as assignee from his private resources to the amount of $2,140 to cover the seven per cent. dividend received on his stock in 1893 and his statutory liability to the creditors of the corporation, all of which was thereafter distributed among such creditors, Blake receiving his proportionate share. Thereafter *Barnes* made a proposition to the creditors to personally purchase their claims at a price sufficient to give them sixty-two per cent. of the proved amount after taking account of what they had already received from the trust fund. Such proposition was accepted by all of the creditors except Blake and was carried out, the purchased claims being assigned to third persons and subsequently to the purchaser, he using, in effecting the transaction, some $20,000 of his individual money.

April 12, 1898, Blake sold his claim to the plaintiff, having first released stockholder Pritchard from all liability to the corporation or the creditors thereof on account of such claim. Thereafter, in order to fully carry out the agreement, which was executed in part by such assignment, Blake assigned to plaintiff all rights of action possessed by him to recover damages of the bank or of *John W. Barnes* jointly

with the bank and others, or separately, or against any of the officers of the bank or estate of any deceased officer, and all rights of action possessed by him against such officer or officers or any of them for misconduct of any kind on their part in administering the affairs of the bank or misrepresenting its condition to him and thereby inducing him to deposit money therein and take certificates of deposit therefor when it was in fact insolvent and unsafe.

On the 1st day of August after the assignment of the Blake claim, and after *John W. Barnes* had become the owner of all other claims against the bank, a 12½ per cent. dividend was paid to the creditors out of the trust funds in the assignee's hands, plaintiff being one of the beneficiaries. Prior to the payment of such dividend, all of the seven per cent. dividend paid by the bank in 1893 had been recovered by the assignee, who had also secured a contribution to the trust fund in his hands of $2,000 from Fayette Armsby on account of his stockholder's liability.

On August 3, 1898, after the payment of such 12½ per cent. dividend, the assignee made a full report of his administration, intending to comply with sec. 1701, R. S. 1878, which report showed, among other things, $2,878.23 on hand, and that the dividends theretofore paid, and the money on hand, took into account the full amount of illegal dividends paid by the corporation in 1893 and the stockholder's liability of the assignee and Fayette Armsby. The account was objected to by plaintiff for want of proper itemization of sums paid as dividends and for want of vouchers for such payments, also for want of any showing that stock subscription liabilities had been enforced, or any liability of the assignee, and further to the allowance of compensation to the assignee for reasons specified in the objection.

On October 16, 1898, this action was commenced. On the trial *Barnes* admitted a subscription liability on his part on account of his ownership of stock in the bank, but claimed

it was an asset of the corporation and offered to submit to a charge to cover such liability in the assignment proceedings. On the application of plaintiff his complaint was considered amended by setting up a liability of *Barnes* on account of his assessment note, which was returned as before stated; and the answer of *Barnes* was also considered amended by pleading the statute of limitations as to such claim and alleging that, if any liability existed on account of the facts alleged in plaintiff's amendment, after the surrender of the note, it was to the corporation and passed by the assignment with the other corporate assets, for the benefit of all of the bank's creditors.

Of all the bills receivable, notes, and overdrafts that ultimately turned out to be worthless in whole or in part, none were known to be of that character till after the suspension of the bank except the Howell paper, and there is no proof of any breach of duty on the part of the officers of the bank as to any of such paper, because they did not know the true character thereof. The ignorance of *John W. Barnes* as to the condition of the bank grew out of his reliance upon the honesty, capacity, and fidelity of those in the immediate charge of its affairs, in respect to those matters which he had a right, in the exercise of his duties as a director of the bank, to leave to them as he did under the circumstances. The difficulties which caused the suspension of the bank were inherited from the national bank without any knowledge on the part of *John W. Barnes* or breach of duty on his part. The infirmities referred to existed in the assets of the National Bank of Manitowoc prior to *John W. Barnes's* connection therewith and during all the time of its existence thereafter, and without any knowledge of such situation on his part or breach of duty in failing to obtain such knowledge.

Any investigation of the affairs of either of the banks, which duty reasonably required of *John W. Barnes*, would

not have discovered to him the difficulties referred to. The books indicated that the banks were safe. There was no difficulty with any of the paper held by the bank, discoverable by any examination or inspection thereof which *John W. Barnes* was in duty bound to make with the knowledge he possessed or ought reasonably to have possessed, regarding the financial standing of the parties liable on such paper.

The loss on the Howell paper, of $38,000, if it had been known to *Barnes*, was not sufficient of itself to have suggested to him the closing of the bank as unsafe. Without any knowledge on the part of *John W. Barnes*, the aforesaid loss was covered in form by a note of C. C. Barnes, but if that fact had been known to *John W. Barnes* he would reasonably have considered such note good. It was a part of the assets of the bank at the time the Blake indebtedness accrued. Before the suspension of the bank C. C. Barnes conveyed all his estate, including his homestead and household furniture, to it, to secure his liabilities thereto, and the creditors finally realized from such security from $11,000 to $12,000. There was no breach of duty on the part of *John W. Barnes* to the bank or to Blake which resulted in any loss to the latter.

From such facts the court decided as follows:

The payment of $2,000 by *John W. Barnes* into the trust funds in his hands, on account of his stock liability, and acceptance and retention by the creditors of their distributive shares thereof, satisfied such liability. The return to the assets of the bank of the dividend illegally received in 1893 and distributed to and retained by the creditors, satisfied the requisites of sec. 1755, R. S. 1878.

The payment of the dividend did not render *John W. Barnes*, in any event, liable as a director for the payment of the first deposit made by Blake, because such deposit antedated the dividend; further, because the liability of a director under such a statute is penal, and a cause of action on account of such liability is not assignable.

The liability of *John W. Barnes* to make his stock in the bank fully paid was an asset of the bank which passed to the assignee and cannot be enforced in this action.

The account filed by the assignee and issue joined therewith by the objections filed by plaintiff, constitute an action for the enforcement of a subscription liability precedent to this action. Moreover, the remedy of plaintiff in the assignment proceedings is exclusive.

The surrender of the notes in March, 1892, that were given for the twenty per cent. assessment upon the stock of the national bank, did not discharge the stockholders from their liability for the indebtedness represented thereby. However, that does not concern plaintiff under secs. 1755, 1765, R. S. 1878, because he did not become a creditor of the assignor till after such transaction. Further, his claim as to any liability under such sections is barred by the six-year statute of limitations.

There was, in any event, no breach of duty on the part of *John W. Barnes* to Blake after the latter's claim against the bank accrued, hence Blake's claim against *Barnes*, if he had any, was one arising out of false representations as to the condition of the bank at the time the latter deposited his money therein, which liability, if there was one, was not assignable.

All money that has been received, or that is recoverable of *John W. Barnes* in the assignment proceedings or otherwise, on account of his stock liability or the dividend paid to him in 1893, or the liability to make his stock full paid in fact, or the nonpayment of his note given for the assessment on his stock in the national bank, must be treated as a fund for the benefit of all the creditors of the bank in proportion to their claims, who have taken or may take the proper proceedings to participate in the proper distribution thereof.

Judgment should be rendered against the plaintiff dismissing his complaint and for costs in favor of *John W. Barnes*.

From the judgment entered accordingly the plaintiff appeals.

The cause was submitted for the appellant on a brief by *Markham & Markham* and *Timlin, Glicksman & Conway*, and a brief in reply by *Timlin, Glicksman & Conway*, and for the respondent on a brief by *Nash & Nash*.

For the appellant it was contended, *inter alia*, that not only was there entire inattention to the duties of a director by defendant *Barnes*, but such inattention began and continued after notice of matters sufficient to put him upon inquiry and calling for an exercise of diligence and vigilance. Even applying to this case the rule of *North Hudson M. B. & L. Asso. v. Childs*, 82 Wis. 460, and 86 Wis. 292,— the most liberal rule that can be found in the books in favor of directors,—*Barnes* should be held liable not only for gross passive negligence, but also for his affirmative acts in connection with the organization and opening of the new bank and thereafter by which depositors were induced to place their money with the bank. On the question of negligence this case is ruled by *Gibbons v. Anderson*, 80 Fed. Rep. 345. See also *Warren v. Robison*, 1 Utah, 289; *Seale v. Baker*, 70 Tex. 289; *Gerner v. Mosher*, 46 L. R. A. 244. If at common law it is negligence for bank directors to permit their bank to be held out to the public as solvent when it is in fact insolvent (*Delano v. Case*, 121 Ill. 247, 249) it must *a fortiori* be negligence in this state where sec. 4541, R. S., creates a duty in that behalf and enforces the duty by penalty. Cooley, Torts, *651, *658; *Mueller v. Milwaukee St. R. Co.* 86 Wis. 340; Bishop, Non-Contract Law, §§ 132–140; *State v. Shove*, 96 Wis. 1; *Baker v. State*, 54 Wis. 368; *In re Koetting*, 90 Wis. 171; *In re Cook*, 49 Fed. Rep. 842. A breach of this duty, though it subjects the officer to a criminal liability, is none the less a breach of his duty to the clients and customers of the bank. *Delano v. Case*, 121 Ill. 247; *S. C.* 17 Ill. App. 531. See, further, *Warner v. Penoyer*, 33 C. C. A. 222;

Robinson v. Hall, 25 U. S. App. 48; *Trustees v. Bosseiux*, 3 Fed. Rep. 817; *United Society of Shakers v. Underwood*, 9 Bush, 609; 1 Morse, Bank & Banking (3d ed.), §§ 128, 130, 131; *Union Nat. Bank v. Hill*, 148 Mo. 380. Negligently opening up for business and holding out to the public an actually insolvent bank as solvent is the proximate cause of the loss of a deposit made in such insolvent bank. *Houston v. Thornton*, 122 N. C. 365; *Tate v. Bates*, 118 N. C. 287; *Caldwell v. Bates*, 118 N. C. 323; *Solomon v. Bates*, 118 N. C. 311, 321. The liability for this negligent omission of duty survives and is assignable. *Concha v. Murrieta*, 40 Ch. Div. 543; *Morgan v. Ravey*, 6 Hurl. & N. 265; *Wilkinson v. Dodd*, 40 N. J. Eq. 123; *Warren v. Para R. S. Co.* 166 Mass. 97; *Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695; *Stephens v. Overstolz*, 43 Fed. Rep. 465; R. S. secs. 3216–3228, 3237, 3239, 3245; *Milwaukee M. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207; *Hurlbut v. Marshall*, 62 Wis. 590; Morse, Banks & Banking (3d ed.), § 129.

MARSHALL, J. It is considered that the complaint and record disclose very clearly that the primary purpose of this action was to fully wind up the banking corporation by enforcing all liabilities of directors and stockholders which existed in its favor at the time it suspended business, and, as germane thereto, to enforce the personal liability of stockholders, statutory and otherwise, so far as the same can be enforced in an administrative action of this kind.

The purely personal wrong to plaintiff's assignor, in that by false pretenses on the part of *John W. Barnes* as one of the directors of the bank, as to the safety of the institution, such assignor was induced to deposit his money therein to his damage, was not a proper subject for litigation in this case, though the findings cover that field. We apprehend that the pleader did not intend to join an action for deceit resulting in damage to plaintiff's assignor, with an action in

equity to wind up the corporation and enforce, for the benefit of its creditors, the liabilities of stockholders and directors, which are the proper subjects of equity jurisdiction in such a proceeding, though the case seems to have drifted into that field. Obviously, the cause of action for deceit, if there were one, which accrued to Blake, was a purely personal right to damages to be enforced in an action at law. No other person had any interest in such cause of action. If persons other than *Barnes* were responsible for the deceit because they were joined with him in the administration of the bank affairs, he has no right of action against them for contribution. So there is no reason whatever for bringing that into the administrative suit, the sole legitimate purpose of which is to wind up the corporation and to enforce the liabilities of the defendants in which the creditors are entitled to participate on a basis of equality as a single class, or as classes upon a basis of equality between the members of each class, and to adjust the equities between defendants who may be liable to respond for the benefit of such creditors.

Having reached the conclusion indicated,— that plaintiff did not purpose in this action to unite and enforce a cause of action for deceit, perpetrated upon Blake by *Barnes* or *Barnes* and his associate directors, with a cause of action in equity to remedy, for the benefit of the creditors, the wrongs to the corporation and enforce the liabilities of stockholders to creditors properly cognizable in such a proceeding, for the purpose referred to; and that no purely personal action can be enforced in this case,— we shall not enter upon any extended discussion of the subject of whether the evidence discloses the existence of the personal tort cause of action, or express any opinion as to whether the decision of the trial court was right on that subject, except what may incidentally be said in separating the treatment of that cause of action in the findings of the court and the arguments of counsel from the legitimate subjects of this action, and in discussing those questions that pertain to such subjects.

Gores v. Day, 99 Wis. 276, and *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230, are cited as authority that a creditor may maintain such an action as this. They are in point so far as relates to what we say was the real purpose of the pleader here when the complaint was framed. Each of those cases was instituted to enforce wrongs to the corporation, and it was held that the right to maintain it, in the circumstances stated in the complaint, was expressly given by secs. 3237, 3239, R. S. 1878.

While, as indicated, if a cause of action accrued to Blake against *Barnes*, it has no proper place in this case and was only incidentally brought to the notice of the court by the evidentiary facts regarding the proper subjects of the equitable action, it is considered that the decision of the trial court was right, that it was a purely personal right of Blake and did not pass to plaintiff by the attempted assignment thereof.

The learned counsel for appellant refer to sec. 4253, Stats. 1898, to sustain their contention that the Blake claim, considered as sounding in tort for damages, was assignable, and refer in the same connection to secs. 3216, 3237, 3239, and other sections of the statutes, none of which refer to the cause of action of a depositor in a bank against one or more of its officers for deceit.

Sec. 4253 provides that "actions for damages done to real and personal estate" shall survive. It was construed in *John V. Farwell Co. v. Wolf*, 96 Wis. 10, and the decision there rendered was recently affirmed in *Lane v. Frawley*, 102 Wis. 373. As said in the *Farwell Case*, the statute was taken from Massachusetts, where, long prior to its adoption here, it was construed as referring to injuries to specific property in a physical sense only, that is, to an actual destruction or injury to or loss of specific property, and not as including mere "cheats and frauds resulting in pecuniary loss." Such construction was a part of the statute when adopted here the same as if expressed therein in the most

unmistakable language. Such is the universal rule. *Draper v. Emerson*, 22 Wis. 147; *Westcott v. Miller*, 42 Wis. 454; *Dutcher v. Dutcher*, 39 Wis. 651; *Pomeroy v. Pomeroy*, 93 Wis. 262; *State ex rel. Rogers v. Wheeler*, 97 Wis. 96.

The wording of sec. 4253 is quite different from the New York statute, where actions for damages for conspiracies to defraud and for deceit are held to be assignable. Here "actions for damages done to real and personal estate" survive; there, "actions for all wrongs done to the property, rights or interests of another" survive. The latter language, we would say independent of authority, clearly covers actions for deceit, and the New York court so held at an early day. *Haight v. Hayt*, 19 N. Y. 464.

The language of our statute was first construed in Massachusetts in 1827, in *Holmes v. Moore*, 5 Pick. 257, where it was said that it was adopted in that state from Stat. 4 Edw. III. ch. 7; that the construction given to it by the English courts was that it gives to the executor or administrator of an estate an action of trespass for goods owned by the deceased in his lifetime, carried away; and, by an equitable construction, for any wrong done to such property, notwithstanding it may not have been carried away; and that the statute is confined to injuries to personal estate in the sense held by the courts where it originated. Later, in 1837, in *Read v. Hatch*, 19 Pick. 47, an action for damages for inducing plaintiff, by fraudulent representations respecting the solvency of another, to sell property to such other — a case which, in its facts, presented the identical question here under consideration — the court, speaking by Chief Justice SHAW, said: "It is contended that a false representation, by which one is induced to part with his property . . . to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction and not conformable to the intent of the stat-

ute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damages done to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate." For further authorities on the subject see *Cutting v. Tower*, 14 Gray, 183; *Leggate v. Moulton*, 115 Mass. 552; *Cutter v. Hamlen*, 147 Mass. 471; *Whiteside v. Brawley*, 152 Mass. 133; *Warren v. Para R. S. Co.* 166 Mass. 97; *Houghton v. Butler*, 166 Mass. 547.

The foregoing effectually disposes of the claim that *John W. Barnes* was liable to plaintiff for fraudulently holding out to the public that the State Bank of Manitowoc was safe, whereby Blake was induced to deposit his money therein. Whether he incurred a liability to the corporation for breach of official duty which may be enforced in this action is quite another question and one that does not appear to have been distinctly passed upon by the trial judge in his conclusions of law or definitely presented by counsel for appellant on this appeal separate from the claim that a liability accrued to Blake personally against *Barnes*, or *Barnes* and his associates, for damages for deceit. Obviously, official misconduct of *Barnes* to the injury of the corporation was primarily a wrong to it, which, if enforced at all, must be enforced in the right of the corporation. We find nothing in the learned judge's conclusions of law about such liability, though the findings of fact called for a decision on that important subject. We should say that the learned counsel for appellant also, in their presentation of the appeal, failed to distinguish between injuries directly inflicted to a person dealing with a corporation, through the deceit of one or more of its officers, for which such person may sue such officer or offi-

cers at law for his damages, but which right does not survive and is not assignable, and negligent or fraudulent conduct of officers of a corporation rendering them primarily liable to it for the loss thereby caused to such corporation. Authorities are cited, holding that the latter liability survives, to sustain the contention that the former is assignable. The one is a liability for misconduct in a fiduciary capacity, resulting, in a sense, in a destruction or loss of specific property of the principal, and is assignable as coming within the fair meaning of the survival statute in respect to an injury to personal estate. *Warren v. Para R. S. Co.* 166 Mass. 97. Consistent with that, such liabilities of corporate officers are deemed to be assets of the corporation and pass to its assignee or receiver, if one be appointed, in a general conveyance of the corporate assets to him. *Hurlbut v. Marshall*, 62 Wis. 590.

With what has been said we will pass the subject of whether the facts found disclose a wrong to the State Bank of Manitowoc for which *Barnes* and his associate officers are responsible and which the plaintiff may enforce in this action in the right of the corporation, till the other questions involved in this appeal are disposed of.

The foregoing covers the first three assignments of error, except in so far as they relate to the question reserved. Whatever *Barnes* did or neglected to do which was an actionable wrong to plaintiff's assignor, in that he was thereby induced to deposit his money in the bank, constituted misrepresentations of material facts when he knew or ought to have known the truth, and actionable purely on the ground of deceit. The following cases cited by the learned counsel are actions at law, by an injured party, directly against the wrongdoers to redress such wrongs: *Seale v. Baker*, 70 Tex. 289; *Tate v. Bates*, 118 N. C. 287; *Stephens v. Overstolz*, 43 Fed. Rep. 465; *Gerner v. Mosher*, 58 Neb. 135.

There are numerous cases where the distinction has not

been clearly recognized, if at all, between a wrong to a depositor of a bank committed by its officers, for which they are personally liable directly to such depositor on the ground of deceit, and a wrong by such officers to the corporation for which they are liable to such corporation and through it to the creditors. *Delano v. Case*, 121 Ill. 247, is a good specimen of such cases. It would take too much space to review such cases and to try to bring harmony out of the confusion that would be disclosed, though we venture to say that in most instances that proceed on the ground of negligence the purpose will be found to have been to enforce a liability in the right of the corporation. Such is *Hodges v. New England S. Co.* 1 R. I. 312, often found cited in the books. The confusion on this subject is quite well illustrated by the fact that the *Hodges Case*, a plain action to enforce the right of the corporation because its proper officers failed to do their duty in that regard, is cited in *United Society of Shakers v. Underwood*, 9 Bush, 609, and other authorities upon which the *Delano Case* is grounded, to support the decisions there made, that officers of a bank may be held liable directly to depositors for losses of the bank to the damage of depositors, on the ground of negligence and fraud in performance of their duties to the corporation. Other cases to support the direct action of a creditor against an officer for damages to the former, because of the fraud or negligence or other actionable wrong of the latter, are based on statutes, as, for instance, *Stephens v. Overstolz*, 43 Fed. Rep. 465.

The real principle upon which the cases are probably grounded, which hold that the creditors may sue directors to enforce a personal right against them, is that they are *quasi* trustees for such creditors under the trust-fund doctrine, so called, which, as will be hereafter shown, has no place in our system. The directors of a corporation are trustees for it and bear no other relation to its creditors than the agent of an individual to his creditors.

The fourth exception to the decision of the trial court is to the holding that *John W. Barnes* became the owner of the claims of creditors, other than Blake, by the purchase thereof, it being insisted by appellant that the transaction between *Barnes* and such creditors was a composition of their claims between them and the holder of the trust fund as such. We find nothing in the record to support such contention. The written proposition made by *Barnes* to the creditors was that he, individually, would purchase their claims. We find no indication in it that any party to the transaction did or could have supposed that a composition of claims for the benefit of the debtor, or the representative of the debtor, as holder of the trust fund, was contemplated. The proposition contained this language: "Subject to the conditions and at the times hereinafter stated, I will, in my individual capacity, pay, or cause to be paid, the following sums, being the costs and expenses incurred by the petitioning creditors in the proceedings hereinafter referred to;" and "To each creditor of said bank whose claim has been proved and admitted and who shall accept this proposition, a sum sufficient, with dividends, if any already received by him thereon, to make sixty-two per cent. of the amount proved and admitted. Upon making payment to any creditor as aforesaid, he shall assign his claim to me or to such person as I may direct." The creditors were required to sign a paper agreeing to assign their claims to *Barnes* personally or to his appointee. It was stipulated that the sums payable under the proposition should be due and payable from *Barnes*, clearly indicating that the purchase of the claims was to be a purely personal affair. The form of the assignment of the claims, prepared and submitted as a part of the proposal to the creditors, showed that the claims were to be assigned to *Barnes* personally or to his appointee. True, the words "compromise and settlement" were used several times in the papers; but it seems clear that they were not

used in the sense of a composition and settlement of the claims as between the debtor and the creditors, or an extinguishment of the claims as regards the trust fund, but in the sense of a settlement of such claims as the creditors had against *Barnes* personally; that is, in consideration of *Barnes* making the creditors good for their claims against the debtor to the amount of sixty-two per cent. thereof, they agreed to transfer such claims to him and release him from all personal liability. In no other sense can the language of the proposition, clearly suggesting a personal purchase of the claims, be harmonized with the words "settlement and compromise" so as to give effect to all the language used in the proposal papers, within the reasonable meaning thereof and consistent with the circumstances under which the transaction occurred.

Cases cited to our attention, where a person acted as an agent for the debtor in buying up the claims against him, holding that the transaction extinguished the claims, such as *Bowen v. Holly*, 38 Vt. 574, do not apply to the facts found by the court and abundantly sustained by the evidence. It is essential to a composition that the arrangement should be between the debtor and the creditor, or him who stands for the debtor in the transaction. There must be more than one creditor, for it is the mutual agreement between creditors to make concessions to the debtor that forms the consideration to uphold the composition contract. 6 Am. & Eng. Ency. of Law (2d ed.), 377, and cases cited. It will be readily seen that there was no mutual agreement here to make concessions to the debtor or to the trust fund, but a mutual agreement of creditors to sell their claims to *Barnes* in consideration of his personal promise to pay therefor, as indicated in his proposition.

What has been said on the subject last treated might have been omitted from this opinion because of the conclusions reached on other branches of the case, but as it may be im-

portant in the final winding up of the assignment proceedings, it is thought best to pass upon the question presented.

The next assignment of error combines three propositions: (a) That the contribution of $2,000 made by *Barnes* to the trust fund should be considered as paid upon his liability to the corporation on his stock instead of on his stock liability to creditors; (b) that the proceedings in the assignment do not constitute an action pending to enforce the subscription liability, which should operate to abate this action subsequently commenced to enforce such liability; (c) that *Barnes* is liable in this action, either on his stock liability to the corporation or his stock liability to the creditors. The trial court decided in the negative as to each of such propositions, and as to the first and last of them, at least, we fail to discover any reasonable ground to say that such decision is wrong.

It is elementary that unpaid balances on subscriptions to the capital stock of a corporation are a part of its assets for the payment of its liabilities in winding up proceedings, the same as any other property possessed by it, and that a general assignment by such corporation for the benefit of its creditors vests the title to such unpaid balances in the assignee, and the acceptance by him of the trust carries with it the duty to collect such balances so far as necessary to pay all the creditors of the corporation and the expenses of executing the trust. 5 Thomp. Corp. § 6469, and cases cited in the notes; *Hatch v. Dana*, 101 U. S. 205; Cook, Stock (3d ed.), § 208. It necessarily follows that creditors of a corporation that has made an assignment cannot obtain the benefit of its stockholders' liabilities on unpaid subscriptions in any other way than by becoming parties to the assignment and working out their equities through the assignee.

As to whether the $2,000 contributed by *Barnes* to the trust fund should be applied on his stock liability to creditors and be held to extinguish such liability, none but an

affirmative answer can be given, based on reason and sound legal principles. No other creditor had any right to an individual enforcement of such liability. They were all entitled to participate in the benefits of it in proportion to their claims against the corporation, in a proceeding adapted to that end. *Coleman v. White*, 14 Wis. 700; *Gianella v. Bigelow*, 96 Wis. 185; *Booth v. Dear*, 96 Wis. 516. *Barnes* paid into the trust fund all that could have been collected for the benefit of the creditors on account of his stock liability. All creditors were parties to the assignment proceedings, and received the benefit of *Barnes's* contribution to the trust fund in just the proportion they were entitled by law to participate in his stock liability. No court of equity could have done more for the creditors on account of such liability than *Barnes* did voluntarily and by their co-operation. However irregular the proceedings were by means of which the creditors received the benefit of *Barnes's* personal liability to them, the fact that they received and retained it precludes them from raising any question in a court of equity as to the means by which it reached their hands. The court cannot arbitrarily say, on an appeal to conscience, that money which *Barnes* paid into the trust fund for one purpose, which has been fully executed for the benefit of creditors, shall be applied to some other purpose. Nothing can be plainer than that.

In view of the foregoing, the question of whether the assignment proceedings constitute an action to recover *Barnes's* subscription liability which is effectual to abate this action if it could otherwise be maintained, is not material, though upon what principle it can be so considered is not perceived. The assignment proceeding is not an action in any sense. The assignee could not enforce collection of a subscription liability in the assignment proceedings as the owner of it in trust for the creditors. He could enforce it only by action. Such liabilities are mere choses in action in the hands

of the assignee, which must be collected, if at all, in adversary proceedings by an action of some sort.

Further complaint is made because the trial court decided that the liabilities created by secs. 1755, 1765, Stats. 1898, were not assignable. We are not able to discover that the court so decided as to sec. 1755. Such section requires stockholders in a corporation, who receive any refund of money paid in for the capital stock owned by them respectively, to return the same to the corporation for the payment to that extent of all debts owing by the corporation at the time the money was received by such stockholders. The court held that such section does not apply to this case because all of the indebtedness of the bank which was owing at the time the assessment notes were returned has been paid or conveyed to defendant *Barnes*, who makes no claim under it.

The court did hold that if the right of action accrued against *Barnes* in favor of Blake under sec. 1765, Stats. 1898, by reason of *Barnes* being officially a party to the payment of a dividend, such liability was not assignable. That section renders directors who violate its provisions jointly and severally liable to all the creditors of the corporation then existing. The decision of the trial court was that a claim under such section is not assignable because the liability is penal. A right of action to recover a penalty does not survive at the common law. That is elementary, and certainly there is no statute covering the subject.

Now as to whether a liability under sec. 1765 is penal in its character, and whether the general rule that a right of action to enforce such a statute does not survive and therefore is not assignable, there is much conflict. Counsel for appellant cite cases to support the negative of the proposition (*Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695; *Stephens v. Overstolz*, 43 Fed. Rep. 465), while cases supporting the affirmative are cited by respondent. *Stokes v. Stickney*, 96 N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117; *Merchants' Bank*

v. Bliss, 35 N. Y. 412; to which many others may be added. *Wiles v. Suydam*, 64 N. Y. 173; *Easterly v. Barber*, 65 N. Y. 252; *Veeder v. Baker*, 83 N. Y. 156; *Victor W. P. & F. M. Mfg. Co. v. Beecher*, 97 N. Y. 651.

We will not incumber this opinion with a discussion of the cases cited, and the many others that might be cited, touching the subject of whether such a statute as the one under consideration is penal, considered with reference to the assignability of claims under it. If we test the statute by the familiar rule,—that a statute which imposes a forfeiture or a penalty for transgressing its provisions or doing a thing prohibited (Potter's Dwarris, Stats. 74; 18 Am. & Eng. Ency. of Law, 270) is penal in character, and that if the penalty or forfeiture does not go to the public but to a person individually interested directly in the matter to some extent, the recovery for his benefit not being limited in any respect by the injury sustained by him, showing that the primary purpose of the statute is public, it is nevertheless penal,—we shall have no difficulty in reaching a right conclusion.

Under the statute in question a violation of its provisions, resulting in damages to the creditors of the corporation in such a trifling amount as not to be appreciable, may nevertheless result in the guilty party being liable directly to such creditors for all of their claims.

The reasoning of the cases holding that such a statute is purely remedial in character, and that the liability under it is a property right that may pass by assignment, seems to overlook the fact that the primary purpose of the legislation is public and that the extraordinary liability visited upon the transgressor, without regard to the actual damages suffered by the individuals either in their primary or secondary capacity, is punishment for the wrong done, pure and simple; that such being the primary purpose of the statute the mere fact that the punishment inures to the benefit of a particular

class of individuals instead of to the state, does not make the statute remedial and the liability under it an indebtedness to the creditor, or incident to an indebtedness of the corporation to him. What is the primary purpose of the statute? That is the question. If that is public, the liability of a person for violating it to be mulcted in a sum having no reference whatever to the loss caused to creditors thereby, cannot, it would seem, be reasonably said to be other than a penalty, merely because the beneficiaries of the liability are private persons. We recognize the fact that there is high authority against this rule, but it is in accordance with what we deem to be the weight of authority and the better reasoning.

Our conclusion is that the statute in question, sec. 1765, Stats. 1898, is penal in character, and that a liability under it is not assignable. That construction has no application whatever to the statutory liabilities of stockholders to creditors, which are contractual in character, or the statutory liability of officers of corporations for damages sustained by them by official misconduct of their officers and directors.

The principles here applied have heretofore received the sanction of this court. We could not reach a different conclusion as to the law under consideration without overruling *Cotter v. Plumer*, 72 Wis. 476. The law there considered was sec. 4269, R. S. 1878, fixing the measure of damages "in all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass," at "the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from him with notice." It was held that the statutory rule of damages was penal in character, and that a claim to its benefits will not survive the death of the wrongdoer. The only

element in the statute that led to such conclusion was that which gives to the injured party a sum far in excess of his actual damages attributable to the wrong. The primary purpose of the statute, however, manifestly was to discourage the wrongful cutting of timber by punishing the wrongdoer for the benefit of the injured party.

There is left to be considered the question of whether the facts disclosed by the evidence show official misconduct of the officers of the State Bank of Manitowoc, to its injury, which may be redressed in this action. That branch of the case seems to have been considered by the trial court only in respect to direct injuries to creditors by corporate officers, remediable in an action in the right of the former as *quasi cestuis que trustent* of the latter. The court said there was a species of agency between the creditors of a corporation and its directors, the relationship between them being that of *quasi* trustees; that a violation of the duties of such relationship is the subject of a direct action by the creditors against the directors. There are some authorities that support that view. They prevail in jurisdictions that uphold the trust-fund doctrine, so called, as regards the property of a corporation, in that it is held in trust by the directors of the corporation or the corporation for the benefit of its creditors. That doctrine has very little, if any, place in our system.

The idea that officers of a corporation are in any sense trustees of its property for its creditors has been quite recently considered in this court and disapproved in *Slack v. N. W. Nat. Bank*, 103 Wis. 57, where the following language from the opinion of the court in *Hollins v. Brierfield C. & I. Co.* 150 U. S. 371, was quoted and approved as stating the correct rule on the subject: "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a

debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." So if, by the negligence or fraud of the officers of the corporation, its assets to some extent were lost, the liabilities to make good such loss were assets of the corporation and passed by the assignment to *Barnes* for the benefit of its creditors. Thomp. Corp. §§ 4121, 4122; *Movius v. Lee*, 30 Fed. Rep. 298; *Howe v. Barney*, 45 Fed. Rep. 668. Nevertheless a creditor may maintain an action to enforce such liabilities *in the right of the corporation or of the person in whom such right is vested, if the necessities of the case so require.*

Sec. 3237, Stats. 1898, provides that the circuit court shall have jurisdiction over directors, managers, trustees, and other officers of corporations, to order and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees, or other officers; and sec. 3239 provides that the jurisdiction conferred by sec. 3237 "shall be exercised in an action prosecuted by the attorney general in the name of the state, or by any creditor of such corporation, or by any director, trustee, or officer thereof having a general superintendence of its concerns, as the case may require or as the court may direct." It is plain that the creditor has not the absolute right to maintain such an action. Where the title to the claim for damages is in an assignee for the benefit of creditors, he is the person who should invoke the jurisdiction of the court, and a creditor cannot take his place in the matter unless the necessities of the case so require or the court so direct; and the facts in that regard, according to the settled practice, must be made to appear on the face of the complaint. The right to maintain such an action was sustained

in *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230, and *Gores v. Day*, 99 Wis. 276; *Gager v. Bank of Edgerton*, 101 Wis. 593; *Gager v. Marsden*, 101 Wis. 598. The complaint in each case showed that the person in whom the title to the cause of action was vested was hostile to its enforcement, therefore the creditor was permitted to stand in the place of such hostile party and enforce the claim in his right. The same situation appears in this case.

So, though the plaintiff has no title to the cause of action to recover, of the officers of the corporation, damages caused to it by their official misconduct, if there be any actionable wrong in that regard he may properly stand in the place of the assignee, *Barnes*, who has such title, under sec. 3239, Stats. 1898.

Much labor was expended by the learned counsel for the appellant on the subject of the degree of care that the directors of a corporation are bound to exercise in the conduct of its affairs, at the peril of being responsible for loss to the corporation chargeable to their negligence. If the question were an open one in this state it would be profitable to consider it and discuss at some length the numerous authorities cited to our attention. It is by no means certain that the standard of care with which directors of banks should be charged is put too high in any of such cases. However, the standard for this state is deemed to be too firmly established to admit of discussion or to be changed by the action of the court alone. In *North Hudson B. & L. Asso. v. Childs*, 82 Wis. 460, the rule for this state, based in the main on *Briggs v. Spaulding*, 141 U. S. 132, was expressed thus: "As they [directors] render their services gratuitously, they are not to be held to the degree of responsibility of bailees for hire." "They are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of want of good faith."

"The degree of care they are bound to exercise is that which ordinarily diligent and prudent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; they are not liable, in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment, and bad management in making investments on doubtful or insufficient security. Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence." The learned counsel for appellant is quite justified in saying that that is as liberal a rule, at least, if not the most liberal, that can be found in the books. However, it is considered that the doctrine of *stare decisis* requires that such rule shall be adhered to. Therefore, by it the conduct of the respondent and his associates in this case must be tested; though it must be remembered that such rule has no application to that branch of this case regarding the charge that, by the fraudulent conduct of respondent and his associates, Blake was induced to deposit his money in the bank.

In view of what has been said we are unable to see wherein respondent was negligent to the injury of the corporation. There is no evidence of active, deliberate fraud on his part, no evidence of intentional breach of trust, no evidence that any loss accrued to the corporation through the making of loans from any other cause, at least, than mere bad judgment. We are now of course speaking of what occurred after the formation of the new bank and have no reference whatever to the defalcations which occurred during the existence of the national bank and prior to the connection of *Barnes* therewith. In fact there is no evidence that any money was actually lost by the corporation by any loans that were not considered good, and properly so considered,

when made, no evidence that any of the assets of the corporation were appropriated by the respondent or by any of his associate officers in the state bank, and no evidence that any of the infirmities which caused its final downfall could have been discovered by *Barnes*, by any examination which he could reasonably have made or that might have been made by the other officers, and remedied. If we say he should have discovered the fact that there was a loss on the Howell paper of $38,000, covered by his brother's note for that amount, there is no evidence to impeach the finding that such loss could not have been reasonably prevented after the formation of the new bank, or that the note of C. C. Barnes would reasonably have been considered a good asset prior to the suspension of such bank; or, if the fact were otherwise, that any greater sum could reasonably have been recovered of C. C. Barnes or any of the other stockholders on their stock subscription liability, which the loss on the Howell paper developed, than was collected or is now collectible. As to C. C. Barnes, it appears that his property was all turned over to the bank and that some $12,000 has been realized therefrom. As to the other two stockholders who were actively engaged in conducting the bank, it satisfactorily appears that they were insolvent so that nothing could have been collected from them. As to stockholder Pritchard, his liability was released as to the plaintiff's claim, by plaintiff; and as to the other two stockholders, *Barnes* and Armsby, the interest of plaintiff in their stock subscription liability is trifling in amount and can be amply protected in the assignment proceedings. He has no sufficient equity to call for the maintenance of this action, to realize on his small interest in the stockholders' liability of defendants *Barnes* and Armsby; and as there is no other creditor interested in such maintenance, the trial court properly reached the conclusion that the bill should be dismissed.

There are some questions discussed in the able briefs of the learned counsel for appellant which do not require to be noticed in this opinion, in view of the conclusions reached upon the main points in the case. Each question in any way affecting the appeal, not specifically mentioned, has been the subject of careful study and investigation. The judgment appealed from must be affirmed.

By the Court.—So ordered.

MCKEAGUE, Respondent, vs. THE CITY OF GREEN BAY, Appellant.

106 577
107 585
106 577
113 70
113 515

April 6 — April 27, 1900.

Municipal corporations: Injury from defective sidewalk: Notice, on whose behalf given? Husband and wife.

Where several and distinct claims for damages may be based upon an injury caused by a defect in a street, the notice given under sec. 1339, Stats. 1898, must show, in order to support an action, that it was given on behalf of the plaintiff. So *held* in an action by a husband for loss of his wife's services, where the only notice of her injury stated that *she* would claim satisfaction, and did not show that she was a married woman, that her husband had sustained any damage, or that he was intending to prosecute therefor. *Parish v. Eden*, 62 Wis. 272, and *Reed v. Madison*, 83 Wis. 171, so far as they are in conflict with the foregoing, overruled. CASSODAY, C. J., concurring in the decision, is of the opinion that neither of said cases need be overruled.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

Action to recover damages for loss of services of plaintiff's wife. The complaint sets out that plaintiff's wife met with an accident on May 30, 1894, while passing along a sidewalk in the city, caused by its defective condition. A notice, which was set out in full, was served on the city on Au-

gust 25, 1894. It is with reference to the sufficiency of this notice that the chief controversy arises. The notice was directed to the common council of the city of *Green Bay*. So far as is necessary to raise the questions here involved, the notice was as follows:

"Take notice that Anna McKeague, of the city of *Green Bay*, was, on the 30th day of May, 1894, injured while walking along and upon the sidewalk." Here follows a description of the place of the accident, the defects in the sidewalk, and the injuries sustained by her. It concludes as follows: "That said Anna McKeague has, by reason of said injuries, suffered great mental and bodily pain, and still continues to so suffer. That she shall claim satisfaction for such injuries so sustained and occasioned from said city of *Green Bay*.

"WIGMAN & MARTIN,

"Attorneys for said Anna McKeague."

A demurrer to the complaint was interposed and overruled. The city then answered by general denial. At the trial the defendant objected to the introduction of any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. The defendant also objected to the notice in question being offered in evidence, which was overruled. Plaintiff offered evidence tending to support the cause of action stated in the complaint. A motion for a nonsuit was denied. Defendant offered no testimony. The jury brought in a verdict for $853 damages. A judgment was entered for plaintiff, from which the defendant has appealed.

Sol. P. Huntington, for the appellant.

For the respondent there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin*.

BARDEEN, J. The sole question arising upon this appeal is whether the notice put in evidence was sufficient under sec. 1339, R. S. 1878. That section provides that, if dam-

age shall happen to any person by reason of the insufficiency or want of repairs of any street, the injured party shall have a cause of action against the municipality charged with the duty of keeping it in repair. It also distinctly provides that: "No such action shall be maintained against any . . . city . . . unless within ninety days after the happening of the event causing such damage, notice in writing, signed by the party, his agent or attorney, shall be given the . . . mayor or city clerk of the city against which damages are claimed, stating the place where such damage occurred, and describing generally the insufficiency or want of repair which occasioned it, and that satisfaction therefor is claimed of such . . . city."

Plaintiff's right of action was a creature of the statute; hence the legislature has the right to annex such conditions to its enforcement as they might think proper. *Daniels v. Racine*, 98 Wis. 649. These conditions are: (1) Notice in writing; (2) it shall be signed by the party, his agent or attorney, and shall be given the mayor or city clerk; (3) the place of the accident shall be stated; (4) the insufficiency complained of shall be described; (5) it shall state that satisfaction for such injury is claimed. Admitting the right of the legislature to prescribe these conditions, the courts have no right to dispense with their performance. They are in the nature of conditions precedent to the right of the injured party to maintain an action.

Testing the notice in question by the requirements of the statute, we find it wanting in several important particulars. It is not, and does not purport in any respect to be, a notice for or in behalf of the plaintiff. Neither the plaintiff nor his alleged cause of action is even *remotely* referred to therein. So far as can be ascertained therefrom, it is a notice given by a stranger of a claim in her own right, and for which *she* was claiming satisfaction. By no possible stretch of judicial construction are we able to say from this notice

that the claimant was a married woman, that her husband had sustained any damage, or that he was intending to prosecute therefor. The notice expressly limits the claim for satisfaction to such injuries as the claimant herself had sustained. It is quite within the possibilities that, had the city been advised that the claimant was a married woman and that her husband would also seek compensation for his damages, it might have sought to have settled and compromised both claims. But there is not a syllable or a word in the notice to apprise the city authorities of any such other or additional claim. There is no room for construction or inference. The notice utterly fails to come up to the statutory demands, and the demurrer to the complaint should have been sustained. *Sargent v. Gilford*, 66 N. H. 543, is a case quite similar to the one under consideration, in which it was held that the filing of a statement by the wife did not fulfill the statutory requirement as to her husband. In reaching this result we believe we have but recognized the plain and unambiguous terms of the statute, and have only given effect to the clearly expressed will of the legislature.

We regret to say, however, that there are one or two decisions of this court which give countenance to the result arrived at by the court below. It was in the endeavor to follow in the line of these cases that the trial court was led into error. The first of these cases is *Parish v. Eden*, 62 Wis. 272. The action was by the father, as administrator, to recover, for the benefit of himself and wife, for injuries resulting in the death of their minor son. The notice given by the father was in full compliance with the statute, except that the mother did not join therein. It was held that, as the damages went to the father and mother jointly, a notice given by either the administrator or one of the joint beneficiaries was sufficient under the statute. The case did not attempt to establish a rule applicable to a case where the same accident caused injuries in which the damages, as

in this case, were necessarily several and distinct. The other case relied upon is *Reed v. Madison*, 83 Wis. 171, a case somewhat unique in its facts and in the conclusions arrived at. The action was to recover damages for an accident to plaintiff, which happened September 11, 1878, by reason of a defective sidewalk. At the time of the accident plaintiff was about seven years of age. At that time there was no statute requiring notice. Sec. 1339 went into effect November 1, 1878, leaving fifty days in which notice could have been given. On October 11, 1878, the plaintiff's father commenced an action to recover his damages for the injury to his child, and served a summons and complaint upon the proper city officers. No notice of any kind was ever served for or on behalf of the child. It was conceded that the statute requiring notice was applicable to the case. The conclusion arrived at by the court was that the father was the natural guardian of the child, and as such could give the notice in her behalf; that the service of the complaint in the father's action was a sufficient notice to the city under the statute, and which inured to the benefit of the daughter. The opinion quotes with apparent approval the following language from *Parish v. Eden:* "Such a notice informs the town of the location and nature of the alleged defect in the highway. *This is all the statute requires.*" This view of the statute is altogether too limited. The court had no right to say that definite requirements of the statute could be omitted and the right given still be preserved. The right given to prosecute for damages was given to be executed and enforced according to certain prescribed conditions. Those conditions are deemed important because the legislature has seen fit to make them such. A new right was created, to be enforced only as those conditions were observed. The requirement that the notice shall be in writing, signed by the party, his agent or attorney, is just as positive as that the notice shall state the location and nature of the de-

fect complained of. If the court may dispense with one, it may with other requirements. No one would have the hardihood to claim that the court might dispense with the notice altogether. Having prescribed in definite terms the conditions upon which the right given may be pursued and enforced, it is no hardship to require a substantial compliance therewith. Except in the *Reed Case*, and possibly in the one above mentioned, it is believed that this court has consistently held to that rule. These notices are not to be construed with technical strictness, but enough must appear to show that they were intended as a basis for a claim against the city, and that they were given on behalf of the person who brings the suit. This is the rule in Massachusetts, from which our statute is said to have been taken, and is laid down in a very late case. *Driscoll v. Fall River*, 163 Mass. 105. Hence it appears both in the *Reed Case* and in the case at bar that the notices under which it is sought to support the action did not purport in any way to be given as a basis for the claims sought to be enforced, nor were they given in behalf of the persons bringing the suits. The omission of these requisites was a failure to meet the calls of the statute, and hence the cause of action never ripened. Any other conclusion would read from the statute plain and unequivocal language.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CASSODAY, C. J. I concur in the reversal of the judgment in this case. Under our statute the right of action in favor of the plaintiff's wife was separate from the cause of action in favor of the plaintiff. *Shanahan v. Madison*, 57 Wis. 276; *McLimans v. Lancaster*, 63 Wis. 599, 600. That being so, the plaintiff, as well as his wife, was required to serve the requisite notice in order to preserve his right of action. But, to my mind, it does not follow that *Parish v. Eden*, 62

Wis. 272, or *Reed v. Madison*, 83 Wis. 171, should be overruled. In the *Parish Case* the action by the administrator for the death of the nine year old boy was for the benefit of the father and mother of the boy, who were the real parties to the action, though not named as such. *Strong v. Stevens Point*, 62 Wis. 255. This being so, it was held that the notice signed by the father, though not by the mother, was sufficient for both, as there was but one cause of action. The doubt expressed in that case as to whether the statute requiring such notice was applicable was approved in *McKeigue v. Janesville*, 68 Wis. 50.

In the *Reed Case* the little girl who was injured was less than eight years of age, and, of course, incapable of serving the notice. A month after she was injured her father commenced an action against the city to recover damages for the care and expenses on account of her injury and sickness and for the loss of her services. In that action the complaint alleged all the facts in respect to the defect in the sidewalk and all the facts in respect to her injury which would have been essential to her recovery. This court held that the complaint in that action by the father and natural guardian of the child was sufficient notice to the city to preserve the right of action in the child. As the only objects of the statute requiring such notice were to enable the city to investigate the facts in respect to the alleged defect in the sidewalk, and also to enable the city to settle for and compromise the damages for the injury, such objects were satisfied by the service of such complaint by the little girl's natural guardian. To have held otherwise, it seemed to the court as then constituted, would be the giving of more importance to form than to substance. Such construction of the statute has existed unchallenged for many years, and, presumably, has during that time been acted upon throughout the state. Assuming that such construction was strained and a departure from the strict letter of the statute, still,

under recent decisions of this court, such construction should not be overruled (*State ex rel. Heiden v. Ryan*, 99 Wis. 127; *Eau Claire Nat. Bank v. Benson, post*, p. 624); especially in a case where the facts are so widely different as in the case at bar. But the overruling of the cases mentioned naturally suggests to the legislature whether such strict construction should be applicable to persons incapable of acting for themselves, and hence dependent entirely upon the voluntary action of some one in their behalf.

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106 584
D183 US 693
D46 Led 398
D22 SC 934

THE STATE EX REL. GATES vs. THE COMMISSIONERS OF PUBLIC LANDS and another.

April 6 — April 27, 1900.

Revision of statutes: Repeal of special statutes: Public lands.

The continuation in the Statutes of 1898 of the general provision of the Revised Statutes of 1878 relating to the sale of swamp lands, and the repeal of all acts or parts of acts inconsistent with the new statutes, did not repeal a special statute (ch. 367, Laws of 1897), taking particular lands out of the control of such provision.

MANDAMUS to the Commissioners of Public Lands and James O. Davidson as state treasurer: *Peremptory writ denied.*

Sec. 205, R. S. 1878, fixed the minimum price of state swamp lands. By ch. 324, Laws of 1878, state lands within certain specified territory were withdrawn from sale and reserved for a state park. By ch. 367, Laws of 1897, ch. 324 aforesaid was repealed and certain lands therein mentioned, including the state park lands, were required to be appraised and placed on sale as therein provided. Such lands were appraised accordingly and measures taken to further execute the law. In August, 1897, the statutes of this state were

revised, sec. 205 of the Revised Statutes of 1878 being carried into the revision without change. The special law of 1897 was not expressly repealed. By ch. 345, Laws of 1899, such special law was amended and recognized as being in force.

On February 10, 1900, the relator applied to the *Commissioners of Public Lands* for leave to purchase a considerable quantity of state swamp lands under sec. 205, Stats. 1898, that were within the territory affected by the special act of 1897, and such proceedings were had as to entitle him to have his application granted if the lands applied for were subject to sale under such section. The *Commissioners of Public Lands* rejected the relator's application upon the ground that the sale of the lands applied for was governed by the special law of 1897.

The facts above related, in the main, were embodied in a petition verified by the relator and filed in this court, upon which an alternative writ of *mandamus* was regularly sued out, requiring the *Commissioners of Public Lands* to grant the relator's application or show cause why to the contrary on the return day of the writ. On such return day the respondents moved to quash the writ.

Rublee A. Cole, for the relator.

The Attorney General, for the respondents.

MARSHALL, J. The sole question that requires solution in this cause, raised by the respondents' motion to quash the alternative writ of *mandamus*, is, Did the continuation in the Statutes of 1898, of sec. 205, R. S. 1878, in connection with the repealing clause of the new statutes — repealing "all acts and parts of acts the subjects whereof are hereby revised and re-enacted or which are repugnant to its provisions,"— displace the special law of 1897 regulating the sale of state lands therein mentioned?

The rule is that a general law, or the mere re-enactment

of a general law, will not repeal a special act by implication. 23 Am. & Eng. Ency. of Law, 422, and notes; Endlich, Interp. Stats. § 223; *Chew Heong v. U. S.* 112 U. S. 536; *Gilchrist v. H., H. S. & S. R. Co.* 47 Fed. Rep. 593. Also that a mere re-enactment of a statute continues it without change as regards special laws within its general scope. *State ex rel. Farrell v. Howe*, 95 Wis. 530; *Baines v. Janesville*, 100 Wis. 369.

So there can be no question but that the special law of 1897, governing the sale of swamp lands within the territory there designated, was unaffected by the mere carrying forward and continuation of the general law relating to the sale of such lands, which existed when such special law was enacted, into the revision of 1898; and the proposition under discussion must be resolved in the negative, unless the general repealing clause of the new statutes changes the situation. On that subject the law must be considered as settled by the decisions of this court, rendered when a similar question was presented for adjudication under the Revised Statutes of 1858. The court then held that the general repealing clause of the revision only referred to general statutes, not to statutes regarding particular matters within their general scope. *Walworth Co. v. Whitewater*, 17 Wis. 193; *Janesville v. Markoe*, 18 Wis. 350. It was held in those cases, in effect, that the legislative purpose of the provision must prevail; that such purpose was clearly disclosed by the act authorizing the revision; that such act allowed the revisers to deal only with general statutes; that special laws and laws dealing with particular matters within the scope of general laws, were not to be disturbed by the revision, except as changed otherwise than by the general repealing clause; and that such clause referred to general laws only.

The reasoning which led to that conclusion applies perfectly to the present situation. The new revision was authorized by ch. 306, Laws of 1895, which provided for 'a

compilation of existing general laws and the preparation and submission of a bill or bills for the correction of errors and the bringing about of harmony where repugnant provisions were found to exist; also, bills for additional sections where necessary to carry out the general spirit and design of the statutes.'

The whole scheme of the revision repels the idea that it was the legislative intent, by the mere continuation of the general provision of the old statute as to the sale of swamp lands, and the repeal of all acts and parts of acts inconsistent therewith, that it should displace a special statute taking particular lands out of the control of such provision. The rule in *State ex rel. Farrell v. Howe*, 95 Wis. 530, and *In re Gilbert*, 94 Wis. 108, applies.

It follows that the special law of 1897, regulating the sale of state swamp lands within the territory mentioned therein, is in force, and that the application of the relator for leave to purchase such lands under sec. 205, Stats. 1898, was properly rejected, and that the motion to quash the alternative writ of *mandamus* must be granted.

By the Court.— So ordered; and that the proceedings be dismissed with costs against the relator to be taxed according to law.

TOWN OF IRON RIVER, Appellant, vs. BAYFIELD COUNTY, Respondent. 106 587 108 673

April 6 — April 27, 1900.

(1, 2) *Demurrer* ore tenus: *Dismissal of complaint: Review on appeal: Bill of exceptions.* (3–5) *Taxation: Collection of delinquent taxes by county: Recovery by town: Presumptions: Purchase by county at tax sale.*

1. If it appears from the judgment roll that a judgment dismissing the complaint proceeded upon the insufficiency of the complaint to state a cause of action, a bill of exceptions showing further how

that question was raised is unnecessary to present it for review on appeal.

2. An order, reciting that the issue of law raised by the demurrer to the complaint came on to be heard and was argued by counsel, and directing that the complaint be dismissed with costs and that judgment be entered accordingly, was followed by a judgment reciting the order and dismissing the complaint. There was no written demurrer. A bill of exceptions showed that evidence had been taken before a referee and reported to the court before the making of the order for judgment, and did not show that the oral objection to any evidence under the complaint, made before the referee, had been renewed before the court. *Held*, that the judgment was an adjudication merely of the insufficiency of the complaint, and that an appeal therefrom presented that question only for review.

3. Sec. 1114, Stats. 1898 (providing that the county treasurer shall credit the amount of delinquent taxes to the town treasurer, and that such delinquent taxes shall belong to, and be collected for the use of, the county, "but if such delinquent taxes exceed the sum then due the county for unpaid county taxes such excess, when collected . . . shall be returned to the town treasurer for the use of the town"), precludes recovery of delinquent taxes by the town from the county, until collection in excess of the unpaid county taxes is in fact made.

4. No presumption arises that taxes on lands, returned as delinquent, have been collected by the county.

5. The purchase of lands at a tax sale, enjoined upon the county treasurer by sec. 1138, Stats. 1898, in case the land cannot be sold for the amount due, is merely a step towards collection, and is not a collection, of the tax within the meaning of sec. 1114. [Whether the taking of tax deeds by the county would bear a different aspect, not determined.]

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff town filed as a claim with the county board of supervisors a petition setting forth that the county was indebted to the town in the sum of $45,461.54 for balance of account for delinquent taxes returned by the town treasurer of said town to the county treasurer of said county in the years 1893, 1894, 1895, 1896, 1897, and 1898 (being taxes for the years 1892 to 1897, inclusive), and asserting that the peti-

tion annexed was a true statement of all the delinquent taxes returned, and also a true statement of all credits to which the county is entitled, and alleging that the town had during all of that period paid all state taxes, county taxes, school fund income taxes, and all taxes whatsoever due from said town, except those credited to the county in said annexed statement. The statement annexed as an exhibit contained the totals of the delinquent tax lists for the years named, aggregating $77,049.84, and, as credits to the county, all of the general county taxes, and $383.72 for illegal tax certificates, aggregating $31,588.20.

The claim being disallowed, an appeal was taken to the circuit court for Bayfield county, where no written pleadings appear in the record. An order of reference was made to take proof and report. Before the referee the defendant objected to any evidence under the claim, for the reason that the claim and petition did not state facts sufficient to constitute a cause of action against the defendant. Evidence was then taken, principally in the form of stipulation as to what facts should be taken as proved for the purposes of the case. The bill of exceptions does not disclose the renewal of such objection before the court.

After the filing of said report, and a hearing before the court, the judgment roll discloses an order substantially as follows: "The issues of law raised herein by the demurrer of the defendant to the complaint of the plaintiff coming on to be heard, and the same having been argued by counsel, ordered, that the demurrer of the defendant to the complaint herein be sustained, and that the complaint be dismissed, with costs to the defendant, and that judgment be entered accordingly. By the Court." Whereupon judgment, reciting said order, was entered as of December 8, 1898, dismissing the complaint, and awarding costs to the defendant. From that judgment the plaintiff appeals.

The cause was submitted for the appellant on briefs by

Ryan, Hurley & Jones, and for the respondent on that of *A. W. McLeod.*

DODGE, J. Appellant urges that since the judgment roll discloses no written demurrer, and the bill of exceptions shows no renewal before the court of the objection to any evidence under the complaint, we should consider the judgment as one rendered upon trial of the facts, and should examine the evidence to ascertain whether it supports the judgment. Much confusion results from loosely designating as a demurrer *ore tenus* an objection to all evidence because the complaint is insufficient. As pointed out in *Smith v. Kibling*, 97 Wis. 207, and *Mandelert v. Superior C. L. Co.* 104 Wis. 423, such an objection is not a demurrer, in any sense, within the meaning of our statutory code as to pleading. It is merely an objection to evidence, and the court's decision thereon is merely a ruling on the admission of evidence, to be reviewed on exception and corrected like any other such ruling. True, in passing upon such objection, especially if he sustains it, the court is obliged to decide very much the same questions as would be raised by a general demurrer, and it has been very properly said, therefore, that such an objection is in the nature of a general demurrer made *ore tenus;* but our code recognizes no oral pleadings, and an order sustaining or overruling a demurrer, such as the statute authorizes, cannot properly be made on such an objection to evidence. The judgment dismissing the complaint, if one follows the sustaining of such an objection, results, not from the fact that a demurrer has been sustained, but from the fact that there is no evidence to establish anything except what is alleged in the complaint, which, for the purposes of his objection, the defendant admits to be true. With very plausible logic, accepted temporarily by this court in the first decision of *Dow v. Deissner*, 105 Wis. 386, it has been argued that, since such protest by defendant is only an ob-

jection to evidence, a ruling thereon, although judgment has followed and been appealed from, can only be reviewed if it be excepted to and both the ruling and exception brought into the record by a bill of exceptions. Upon reconsideration, however, and in deference to *Donkle v. Milem*, 88 Wis. 33, we finally decided in *Dow v. Deissner*, 105 Wis. 387, that if it appear from the judgment roll, including the judgment itself, that the latter proceeds upon the insufficiency of the complaint to state a cause of action, such fact is sufficiently authenticated to this court, without any bill of exceptions to show further how the question was raised. Upon the authority of those cases, we must hold that the judgment roll before us, which, of course, includes both the order for judgment and the judgment expressly based thereon, conclusively establishes that none of the evidence taken before the referee was received by the court, but that the judgment is merely an adjudication of the insufficiency of the complaint; that it decides none of the merits, save such as would have been raised by a general demurrer; and that such is the only question before us for review, namely, whether the complaint states facts sufficient to constitute a cause of action against *Bayfield* county.

Turning to the complaint itself, which by force of sec. 685, Stats. 1898, consists of the petition and annexed account filed as a claim with the county board, we find no allegations except that between March 17, 1893, and May 5, 1898, when the claim was presented, the town treasurer had returned to the county treasurer six annual returns of delinquent taxes, aggregating $77,049.84, and that during the same period all taxes payable to the county had been paid, except an amount of $31,588.20, to which it is conceded the county is entitled to credit as against the delinquent taxes so returned.

The relation of the town and the county to delinquent taxes, when returned, is controlled by sec. 1114, which pro-

vides that the county treasurer shall credit the amount of the delinquent return to the town treasurer, and that such delinquent taxes shall belong to, and be collected for the use of, the county, "but if such delinquent taxes . . . exceed the sum then due the county for unpaid county taxes such excess, *when collected* . . . shall be returned to the town treasurer for the use of the town." This clause clearly precludes any right of recovery by the town until collection in excess of the unpaid county taxes is in fact made.

The complaint does not in terms allege that any of the delinquent taxes have been collected. Does any presumption of law supply that allegation? The presumption, at its utmost, is that official duties have been performed; that lands have been offered for sale, and such as were not purchased and paid for by individuals have been, by statutory command, purchased by the county. We cannot presume how much have been treated in either manner. Unless, as appellant urges, the latter act is a collection, there is, therefore, no presumption that real-estate taxes have been collected.

In construing the various provisions of title XIII, Stats. 1898 ("Taxation"), it must be continually borne in mind that the whole general purpose is the collection of revenue for the several subdivisions of the government: state, county, municipal, and school district. The formal acquisition of any lien or title in accordance with those provisions, whether by any municipal corporation or county or by any public officer, is primarily to continue or enforce the original right of the government against property, to the end that it may secure therefrom ultimately the *money* which such property or its owner ought to contribute toward governmental expenses, for with nothing but money can those expenses be paid. Such money, when received, by whichever of the collecting agencies, is then apportioned among the various governmental subdivisions according to their original

rights. In the enforcement of such liens it may be unavoidable — it is always undesirable — that actual title to property should be taken. The purpose of the law, nevertheless, is collection of money, and not acquisition of property; and clear language is necessary to justify inference of a legislative purpose that any step is to transpose the public body or officer from the position of a collecting agent into a proprietary, so as to substitute for the duty to account merely for the money ultimately received a duty to pay the ostensible price. In the light of such general purpose, it cannot be doubted that the purchase of lands at tax sale, enjoined upon the county treasurer by sec. 1138, Stats. 1898, is merely a step towards collection, and is not collection. Such view is emphasized by the fact that the county's control over the certificates is not that of an absolute owner. It cannot hold them to speculate, as could an individual, but must transfer them to any purchaser willing to pay the amount of the taxes which they represent. Sec. 1192. It has no option, but must, unlike an individual, purchase the property at all subsequent tax sales thereof.

Other considerations readily suggest themselves to render highly improbable a legislative purpose that, when the taxpayers of the several towns in a county neglect to pay their taxes, the county must supply the money, prominent among which is the practical impossibility of its doing so. The county has no means of obtaining money except from those very taxpayers. Another consideration was suggested in *Marinette v. Oconto Co.* 47 Wis. 216, 225, in the following words: "If the town treasurers do not collect money and town orders enough to pay the state and town taxes, the town will have a claim for the balance against the county when the same is collected under the provisions of sec. 1114; and, if they cannot be collected by the county, there would seem to be no injustice in saying that the loss should fall equally on the town and county, instead of on the county

alone." Surely the burden on counties of financiering is hard enough, which requires them to pay their own expenses out of proceeds of the bad debts owing the towns, without requiring that they supply money to purchase still other of such bad debts.

So far as this court has approached the question, its utterances are opposed to the idea that the taking of tax certificates at command of the statutes is a collection of the tax. *Finney v. Oshkosh*, 18 Wis. 209, 211; *Fletcher v. Oshkosh*, 18 Wis. 232; *Jenks v. Racine*, 50 Wis. 318; *Hoyt v. Fass*, 64 Wis. 273, 277; *State ex rel. Donnelly v. Hobe*, 106 Wis. 411. The reasoning in *Jenks v. Racine* seems entirely applicable, and well-nigh conclusive of the question now under consideration. The charter controlling the rights of the parties there provided for payment to the holder of a special assessment certificate "after the amount thereof shall have been received into the city treasury." The holding was that a taking by the city of tax certificates covering the amount of the assessment certificates was not a receiving into the treasury of that amount, in reaching which conclusion much stress was laid on the fact that taking the tax certificates was compulsory upon the city, which is equally true of the county under sec. 1114. Whether taking tax deeds by the county would bear a different aspect, we cannot properly decide; for the complaint does not allege the taking of any, and we cannot presume such act, since the law only permits, and does not require, it. Sec. 1194, Stats. 1898. We are fully satisfied that the mere purchase of lands and receipt of the certificates is not a collection of the taxes within the meaning of that section. As a result, we must hold that the complaint fails to allege any collection of real-estate taxes. Whether there were any personal taxes included in the delinquent returns, or, if so, to what amount, or whether any of them have been collected, or charged back as uncollectible, the complaint is silent; and no pre-

sumption *omnia rite esse acta* can justify the conclusion that an amount thereof has been collected in excess of the $31,000 first to be retained by the county before any right to payment arises in the town. The complaint is insufficient, and judgment dismissing the same is right, even though it may have come about in an irregular manner.

In view of the manner in which the judgment was rendered, it is possible that rights may thereby be cut off, which, according to more regular procedure, might properly have been saved by amendment. We deem it advisable, therefore, to leave to the circuit court discretion to grant some relief against such result if plaintiff shall promptly apply for, and be found to merit, the same.

By the Court.—Judgment affirmed. The cause is remanded, with leave to the circuit court, in its discretion, to vacate the judgment and permit amendment of the complaint if plaintiff serve notice of motion therefor within twenty days after notice of filing *remittitur*.

RETTINGHOUSE, Respondent, vs. CITY OF ASHLAND, Appellant. 106 595 109 622 109 624

April 7 — April 27, 1900.

Municipal corporations: Officers: Salaries: Contract for smaller compensation: Accord and satisfaction.

1. Under a charter providing that the city officers shall receive salaries to be fixed annually by the common council and not to be increased or diminished during their terms of office, an agreement between an officer and the mayor, entered into after the appointment of the former, by which he was to receive a certain sum *per diem* in lieu of the salary fixed by the council, is void.
2. The salary of the officer who had entered into such agreement was not paid monthly as the charter provided, but when about two thirds of the term had expired he filed a claim for a sum less than the amount of salary then due him, as being in full for his services for the entire year, and the same was allowed and paid. *Held*, that this did not constitute an accord and satisfaction.

APPEAL from a judgment of the circuit court for Ashland county: O. B. WYMAN, Judge. *Affirmed.*

For the appellant there was a brief by *E. F. Gleason*, attorney, and *Sanborn, Gleason & Sleight*, of counsel, and oral argument by *E. F. Gleason.*

For the respondent there was a brief by *Alvord & Dillon*, and oral argument by *M. E. Dillon.*

CASSODAY, C. J. This action is to recover $300, the balance of the plaintiff's salary as city engineer, and interest. The defendant answered by way of admissions, denials, and counter allegations. A jury trial having been waived, and the cause tried, the court at the close thereof found as matters of fact, in effect, that May 1, 1895, the plaintiff was duly appointed and acted as city engineer of the defendant for the term of one year; that the city council fixed the salary of the city engineer at its first regular meeting in February, 1896, for the year beginning May 1, 1896, and ending May 1, 1897, at the sum of $800; that May 1, 1896, the plaintiff was reappointed to succeed himself for the term of one year, beginning May 1, 1896, and ending May 1, 1897; that May 9, 1896, the plaintiff entered into a written agreement with Thomas Bardon, the then mayor of the city, wherein and whereby he agreed to perform such duties of the office as he should be requested to perform by the mayor at the specified sum of $5 per day for each day actually worked, and waived the salary as so fixed by the common council pursuant to the city charter; that the plaintiff did perform the duties of such office until May 1, 1897; that February 6, 1897, the plaintiff filed a bill with the city council for $500 in full for his salary for the entire year, which was allowed in full May 11, 1897; that June 22, 1897, the plaintiff filed a bill with the city council for $300, the balance due for his salary as so fixed by the council, and the same was disallowed, and from such disallowance the plaintiff duly appealed to the circuit court.

And as conclusions of law the court found that the contract so made between the plaintiff and the mayor was illegal and void, and contrary to the charter of the city, and was made without authority of law, and was void on the further ground that the same was against public policy; that the plaintiff was entitled to the salary of $800 so fixed by the council in February, 1896; that the allowance by the city council of $500 did not constitute an accord and satisfaction; that the plaintiff was entitled to judgment for $300, with interest from May 1, 1897, and costs, and ordered judgment to be entered accordingly. From the judgment so entered the defendant appeals.

The city charter required city officers, including the city engineer, to be paid a salary, which should be fixed annually, and, among other things, provided that "the common council at their first regular meeting in February shall fix the amount of salary which shall be received by every city officer entitled to a salary who may be elected or appointed in the city during the ensuing year, which salary shall not be *increased or diminished* during the term of office for which such officer may be elected or appointed; the salary shall be paid out of the city treasury monthly at the end of each month." Sec. 8, subch. IV, ch. 27, Laws of 1889.

Under that provision of the charter it is very manifest that even the common council itself had no power to increase or diminish the plaintiff's salary during his term of office. Much less could the mayor, who had no power to fix his salary, do so. Such express prohibition in the charter would seem to be for the very purpose of preventing such dickering in respect to salary in connection with the appointment or election of officers, in order to secure more efficient service for the public. *Carrothers v. Russell*, 53 Iowa, 346; *State ex rel. Att'y Gen. v. Collier*, 72 Mo. 13; *State ex rel. Newell v. Purdy*, 36 Wis. 213; *Hoffman v. Chippewa Co.* 77 Wis. 214.

It is virtually conceded that the agreement between the mayor and the plaintiff was a nullity; but it is contended that the existence of the agreement, the filing of the claim for $500 February 6, 1897, as being in full for his services for the entire year, the allowance of the same May 11, 1897, and the subsequent payment of that amount, operated as an accord and satisfaction. The charter provision quoted required that the plaintiff's salary should be paid to him "monthly at the end of each month." At the time of filing his claim, therefore, there was $600 his due, and which ought to have been paid to him at the end of each month, as required, without being filed with the council. The defendant having failed to pay monthly as required, the plaintiff found it necessary, under the charter and the decisions of this court, to file his claim. *Mason v. Ashland*, 98 Wis. 540; *Gutta Percha & R. Mfg. Co. v. Ashland*, 100 Wis. 232; *Telford v. Ashland*, 100 Wis. 238; *Seegar v. Ashland*, 101 Wis. 515. Presumably to insure its allowance, the claim so filed February 6, 1897, purported to be for "services, as city engineer, in full up to May 1, 1897," notwithstanding the plaintiff had three months more to serve, and, under his written agreement with the mayor, was liable to be called upon for such service at any time. Did the filing, allowance, and payment of such claim constitute an accord and satisfaction of the whole year's salary? Counsel for the defendant contends that they did, and relies upon cases in this court in support of his contention. *Continental Nat. Bank v. McGeoch*, 92 Wis. 312–315, and cases there cited. "Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement, and forms a complete bar to any further action on the original claim." *Id.* Such new agreement must have at least some consideration. But the case at bar does not come within the principle of those cases. Here the plaintiff's salary became fixed accord-

ing to law before he entered upon his term of service. The common council had no power to diminish such salary,—much less, the mayor. The several attempts to do so were in direct violation of the charter, and furnish no consideration or basis for an accord and satisfaction. They were, moreover, in violation of a well-settled rule of public policy. The mere fact that the plaintiff filed a claim for a part of his salary which was then due to him, and received the same, did not, under the circumstances stated, preclude him from recovering the residue. *Clark v. State*, 142 N. Y. 101; *Kehn v. State*, 93 N. Y. 291; *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38; *Settle v. Sterling*, 1 Idaho, 259; *Goldsborough v. U. S.* Taney, 80, 92; *State ex rel. Kercheval v. Nashville*, 15 Lea, 697, 54 Am. Rep. 427. As stated by Chief Justice TANEY in the case cited from his decisions, "The exercise of a power not warranted by a law, by the head of a department, cannot create such an equity against the United States as will be recognized and enforced in a court of justice." In the last case cited it was held that "a city charter forbidding any change in the mayor's salary during the term of his office is infringed by an ordinance providing that after the expiration of the term of the then mayor the mayor should serve without compensation; and a mayor is not estopped from claiming compensation by his declarations during the canvass for the office that, if elected, he would not claim compensation." We must hold that there was no accord and satisfaction. This disposes of the only question discussed in the brief of counsel for the appellant.

By the Court.—The judgment of the circuit court is affirmed.

RADANT, Appellant, vs. WERHEIM MANUFACTURING COMPANY, Respondent.

April 7 — April 27, 1900.

Defect of parties: Waiver: Equity: Failure to assert title to land: Estoppel: Mechanics' liens.

1. A defect of parties must be taken advantage of by demurrer if it appears on the face of the complaint, otherwise by answer, or it will be deemed to have been waived.
2. Plaintiff's father, as security for a loan of money, conveyed land and took back a land contract. He assigned the contract to plaintiff, but the assignment was not recorded. They continued to live upon the land, and obtained from defendant building material for use thereon. Plaintiff intended to become the debtor for such material, but defendant supposed the father was the purchaser. Afterwards defendant commenced an action against the father to enforce a lien for such material on the land, but plaintiff, supposing he was the person intended to be sued, appeared and answered. On the trial he discovered the mistake, and withdrew his answer without disclosing the true state of the title, and thereafter kept silent until defendant, with his knowledge, had incurred the expense of obtaining a lien judgment and was proceeding to enforce it. Plaintiff then had the assignment of the land contract recorded, and brought this action to restrain the enforcement of the lien judgment and quiet his title as against it. *Held*, that equity would not aid him, but, for the purposes of the action, would consider the father as the owner of the land.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Action to remove a cloud on the title to real estate on the following facts:

In 1873, when plaintiff was quite a boy, his father, August Radant, Sr., purchased the real estate in question for a home for himself and family and occupied the same as such thereafter, the son residing with him. March 25, 1889, Radant, Sr., conveyed the property to one Henry Gruenwald by deed absolute on its face for the purpose of securing a loan of money, taking back, as evidence of his interest in the prop-

erty, a land contract. The deed and contract were immediately recorded in the office of the register of deeds of the proper county. A few days thereafter Radant, Sr., assigned his land contract to plaintiff, but the assignment was not recorded till May 27, 1897, during all of which time August Radant, Sr., to all appearance, was the owner of the property the same as he always had been, save and except for the mortgage thereon created by the transactions with Gruenwald as before stated. The land contract was assigned to plaintiff partly as a gift from the father and partly in consideration of what plaintiff had done by way of improving the property.

In 1895 the Radants obtained some building material of the defendant for use in constructing a building on the land. The plaintiff intended in the transaction to become the defendant's debtor for the building material, but defendant supposed its customer was Radant, Sr. The material not being paid for, a lien was filed on the property pursuant to the laws of this state relative to mechanics' and materialmen's liens, and thereafter an action was commenced to enforce such lien. The summons and complaint were served on Radant, Sr., but plaintiff, supposing he was the person intended to be sued, appeared in the action and answered. Plaintiff discovered on the trial that the real party sought to be charged was Radant, Sr., whereupon he withdrew his answer without disclosing the true state of the title to the property. He kept silent, with full knowledge of the facts, while defendant proceeded to perfect judgment against Radant, Sr., as the debtor and the owner of the property sought to be charged with such debt. Thereafter defendant proceeded to enforce such judgment by a sale of the property, whereupon this action was commenced to restrain such sale and to quiet the title to the property in plaintiff as against such judgment.

On the trial the defendant offered to release its claim to

a lien against the property on payment of the original indebtedness claimed in the complaint, which proposition plaintiff refused to accept. On such facts the court decided that defendant was entitled to a dismissal of the action and to recover its costs and disbursements of the plaintiff because of a defect of parties defendant, in that Henry Gruenwald, and others not necessary to be mentioned, were not joined as defendants, and for want of equity. Judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *John Livermore*, attorney, and *Bump, Kreutzer & Rosenberry* and *Franklin Bump*, of counsel, and for the respondent on that of *Mylrea & Bird.*

MARSHALL, J. The judgment appealed from is grounded, first, on a defect of parties, and, second, want of equity.

The first ground mentioned is untenable. A defect of parties must be taken advantage of by demurrer if it appears on the face of the complaint, otherwise by answer, or it will be deemed to have been waived. *Kimball v. Noyes*, 17 Wis. 695; *Dreutzer v. Lawrence*, 58 Wis. 594; *Hallam v. Stiles*, 61 Wis. 270. The objection that there is a defect of parties, either plaintiff or defendant, is never a good ground for the dismissal of a complaint on a trial upon the merits.

The second ground upon which appellant's claim was dismissed must be sustained, if at all, upon the familiar principle of equitable estoppel, that "he who keeps silent when in good conscience he ought to speak shall be debarred from speaking when conscience requires him to be silent."

If appellant owed a duty of disclosure to respondent respecting his title, and, by failure to do so, respondent was led to incur expense to perfect his lien judgment and enforce it, upon the belief that Radant, Sr., was the owner of the property, equity cannot properly aid him to change his situation to respondent's prejudice.

Among the earliest applications of the principles under discussion are cases where the owner of property stood by without disclosing his ownership, while another in good faith dealt with such property as that of a third person; and it was held that such owner was in duty bound to correct the error of such other before he so acted as to be prejudiced thereby. *Pickard v. Sears*, 6 Adol. & E. 469; *Gregg v. Wells*, 10 Adol. & E. 90; *Heane v. Rogers*, 9 Barn. & C. 577, 586; *Graves v. Key*, 3 Barn. & Adol. 313, 318; *Niven v. Belknap*, 2 Johns. 572. In *Pickard v. Sears, supra*, to which most of the later authorities refer, it was said, in effect, that one who stands by and keeps silent while his property is being dealt with in good faith as the property of another, ceases to be the owner of such property so far as otherwise the party misled would suffer. That is elementary and has often been applied by this court. *Waddle v. Morrill*, 26 Wis. 611; *Anderson v. Coburn*, 27 Wis. 558; *Kingman v. Graham*, 51 Wis. 232; *Wheeler & W. Mfg. Co. v. Monahan*, 63 Wis. 198. That doctrine was applied in *Baehr v. Wolf*, 59 Ill. 470, where a person who held an unrecorded land contract, knowing that another was negotiating to purchase the land of his vendor without notice of the existence of such contract, failed to notify such other of the true state of the title.

The last case cited brings out the principle under discussion, as applicable to this case, quite clearly. It appears by the record that respondent dealt with Radant, Sr., as the owner of the property in controversy, from the time the indebtedness accrued. The appellant knew that fact soon after the action was commenced. His claim to the property was under an unrecorded land contract. He knew, or ought to have known, from the time the action was commenced, that respondent was proceeding in error as to the true state of the title. He was the real beneficiary of the material for which the indebtedness constituting the lien claim accrued.

Notwithstanding these facts, he kept silent as to his unrecorded contract, though he at one time actually appeared in the action, till respondent had incurred the expense of obtaining the lien judgment and further expense towards enforcing it, and then, without offering to pay for the material, for which appellant acknowledged on the trial of this action he was the real debtor and beneficiary, he commenced such action.

Equity cannot aid the appellant, under the circumstances stated, to prevent the enforcement of the lien judgment. It will consider Radant, Sr., for the purposes of this action, as the owner of the property affected by the judgment.

Appellant could readily have brought the true state of the title to the attention of respondent before the lien judgment was entered, and thereby have prevented its rendition and all necessity for this action, unless the judgment were based on an adjudication that the respondent's claim, under the circumstances, was a lien on appellant's interest in the property. Appellant failed to do that till respondent, with his knowledge, incurred considerable expense in efforts to collect its claim by the remedy given by the lien statute. Such failure was accompanied by circumstances clearly indicating a design to mislead respondent up to a point where appellant's interest in the property could not be reached in a lien suit. As soon as that point was supposed to have been passed, appellant placed his land contract on record so as to deter respondent from enforcing its judgment; and that not being effectual, appellant appealed to a court of equity to aid him. The trial court correctly decided that appellant has no standing in a court of equity.

By the Court.— The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

THOMAS, Appellant, vs. PARROTT, Respondent.

April 7 — April 27, 1900.

Evidence: Instructions to jury: Use of logging road: Implied contract: Exceptions.

1. On the issue whether there was a contract between plaintiff and defendant that the latter should contribute to the repair and maintenance of a logging road to be jointly used by them, it was error to permit defendant to introduce in evidence a written contract between himself and third persons giving him the right to haul timber over roads made or used by them, such roads covering a portion of the road in controversy.
2. An instruction to the jury that "a party going in the woods and finding a logging road or finding a public road had a right to go on and use it" is error, there being no such right in regard to mere private roads.
3. No agreement to pay for the use of a road on lands owned by another person can be implied unless the conventional relation of landlord and tenant exists.
4. Separate exceptions to almost every word in the charge to the jury will not be held bad as being a general exception to the whole charge; but it is the better practice to except only to such portions of the charge as raise a reasonable question as to its correctness or applicability to the case.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

This action is to recover upon an agreement alleged to have been made by defendant to contribute to the expense of constructing a logging road used jointly by the parties. The answer admitted using a portion of the road jointly with plaintiff and other parties named. It alleged that defendant repaired the road, and contributed more than his share towards the maintenance of the road, and denied the other allegations of the complaint. In municipal court the plaintiff had judgment. Upon the trial in the circuit court, the jury found for defendant. It is to review certain rulings as to the admission of evidence, and instructions given

by the court, that plaintiff has appealed from the judgment entered in defendant's favor.

For the appellant there was a brief by *Flett & Porter*, and oral argument by *W. H. Flett.*

For the respondent there was a brief by *Van Hecke & Smart*, and oral argument by *E. M. Smart.*

BARDEEN, J. The issue plainly presented by the pleadings was whether in fact there was an agreement between plaintiff and defendant that the latter should contribute to the repair and maintenance of the logging road to be jointly used by them. The plaintiff testified that such an agreement was made. The defendant denied it, and against the plaintiff's objection was permitted to introduce in evidence a written contract between himself and McInniss & Son, which gave the former the right and privilege of hauling timber over roads made or used by the latter. These roads cover a portion of the roads in controversy. Defendant's counsel announced his purpose in introducing it that it was worth something to the jury, as tending to show that defendant would not be apt to make the contract sued upon, in the face of the contract he already had. In his charge to the jury the court referred to this contract, and stated "that it was admitted here for the purpose of showing or tending to show,—and it is for you to say whether it did or not,—whether the defendant, *Parrott*, in view of having that contract with McInniss, would have made the contract which it is claimed he did make with plaintiff." The court told the jury they might use it for whatever it was worth in determining the controversy. This contract was a collateral matter, and had no connection with the matter in litigation. It was not inconsistent with the agreement claimed by plaintiff. It covered only a portion of the road in question, and was, at best, but a mere license to use the McInniss road. It did not purport to bind either of the parties to

keep up or maintain the road. Such being the fact, it introduced a collateral issue and had a tendency to draw the minds of the jury from the real point to be determined. Its treatment in the charge served to emphasize its harmful character, and made its introduction all the more hurtful to the plaintiff. *Huganir v. Cotter*, 92 Wis. 1.

The court seems to have got somewhat confused in his charge as to the right of persons engaged in logging to use private roads. He instructed the jury that "a party going in the woods and finding a logging road or finding a public road had a right to go on and use it," etc. That is true of a public highway, but, of course, is not true of a mere private road, and the failure of the court to distinguish between the two left the jury without any definite basis to stand upon.

Claims and counterclaims were made in the pleadings for the use of roads by each of the parties on lands owned by the other. No agreement to pay for such use was shown, and the rule is generally that no such agreement can be implied, unless the conventional relation of landlord and tenant exists. *Preston v. Hawley*, 101 N. Y. 586; *Central M. Co. v. Hart*, 124 Mass. 123; *Henderson v. Detroit*, 61 Mich. 378.

Some criticism is made as to the manner in which the plaintiff has preserved his exceptions to the judge's charge. Out of abundant caution, his counsel have separately excepted to almost every word of the charge. Many paragraphs excepted to are mere recitations of the evidence or statements of facts concerning which there was no controversy. Such exceptions are usually considered senseless and useless, and only serve to incumber the record. The practice sanctioned by this court requires separate exceptions to each objectionable portion of the charge. A general exception to the whole charge is not good. There is no rule, however, except such as is suggested by the good sense and good judgment of counsel, which limits the number of excep-

tions that may be taken. It is the better practice to only except to such portions of the charge as raise a reasonable question as to its correctness or applicability to the case in hand. Very strict lines cannot be drawn, and the matter can safely be left to the good judgment of counsel.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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ZIMMERMAN, Respondent, vs. GERDES, Appellant.

April 7 — April 27, 1900.

Service of summons: Proof: Judgment by default: Jurisdiction: General appearance: Appeal.

1. Personal service of a summons, in order to give jurisdiction of the person, must be made within the state; and the fact that service was so made is an essential element of the proof of service required for the entry of judgment upon default under sec. 2891, Stats. 1898.
2. A judgment taken by default without jurisdiction over the person of the defendant and in defiance of sec. 2891, Stats. 1898, will be reversed on appeal, notwithstanding the appeal was a general one from the whole judgment. *Dikeman v. Struck*, 76 Wis. 332, so far as it holds to the contrary, overruled.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

Appeal by the defendant from judgment of foreclosure taken against him upon default, the error alleged being that the judgment was entered without jurisdiction. The proof of service was an affidavit by one John Pugh — not an officer — that at a proper date he served the summons and complaint upon the appellant by delivering to and leaving with him copies, which affidavit, however, wholly failed to state where the service was made. No appearance was made by the appellant, unless by serving a general notice

that he appealed from the judgment against him and from the whole and every part thereof.

The cause was submitted for the appellant on briefs by *Bump, Kreutzer & Rosenberry* and *Roehr & Dierks*, and for the respondent on the brief of *Palmer & Gittings.*

DODGE, J. The default judgment was, under numerous decisions by this court, rendered without jurisdiction. Personal service, in order to give jurisdiction, must be made within the state of Wisconsin, and the fact that service was so made is an essential element of the proof of service required for the entry of judgments by default by sec. 2891, Stats. 1898. *Sayles v. Davis*, 20 Wis. 302; *Weis v. Schoerner*, 53 Wis. 72.

The respondent contends, however, that inasmuch as the defect is merely one of jurisdiction over the person of the defendant it can be waived by him, and that his general appeal from the judgment so waives, constituting a general appearance, and a submission to jurisdiction over his person, which relates back and cures any lack thereof which might have existed at the time of entering judgment, so that the judgment cannot upon such appeal be reversed merely on the ground of defects either in the service or in the proof thereof. The question thus raised must be disposed of upon the weight of authority in this court. It has been the subject of decision very many times since 1864 or earlier, and is no longer open to discussion as an original one. *Knox v. Miller*, 18 Wis. 397; *Sayles v. Davis, supra; Matteson v. Smith*, 37 Wis. 333; *Hall v. Graham*, 49 Wis. 553; *Weis v. Schoerner, supra; Rehmstedt v. Briscoe*, 55 Wis. 616; *Wilkinson v. Bayley*, 71 Wis. 131; *McConkey v. McCraney*, 71 Wis. 576; *Dikeman v. Struck*, 76 Wis. 332. In all of these cases except the last it is held that a default judgment will be reversed on appeal by a defendant as to whom the record fails to present proof of service. Not always is it made entirely clear whether the reason of the reversal is absence of all jurisdiction over

the person of the defendant or error in rendering judgment without the proof of service expressly required by the statute, nor need we in this case, where no offer has been made to amend the proof of service, consider which is the true ground of reversal,— whether, indeed, either or both may not be fatal. *Likens v. McCormick*, 39 Wis. 313, 316; *McConkey v. McCraney*, 71 Wis. 576. As early as *Sayles v. Davis*, 20 Wis. 302, this court, speaking of the practice, by DIXON, C. J., said: "It is true he might have moved the court below to set aside the judgment for want of jurisdiction, and it would have been done. . . . This, in general, would be the better practice, as it expedites the remedy and saves expense. Still, as the practice of reversing such judgments on appeal is well settled, I do not think he can be held to have waived his remedy in that form by not having resorted to the other remedy by motion." In that case the appeal was from the whole judgment, and the appellant attacked it on the merits, as well as for want of the "jurisdiction" to enter any judgment.

The practice so declared settled in that case has been followed through the line of cases above cited, and not without considering the effect of a general appeal to supply the defects of the proof of service. That question we find was raised by respondents' briefs in *Weis v. Schoerner*, 53 Wis. 72, and *Rehmstedt v. Briscoe*, 55 Wis. 616, and in the former the appellant attacked the judgment not only for absence of proof of service, but also because not supported by the complaint. In neither opinion is the question discussed, but the judgments were reversed nevertheless. At the end of this line of decisions comes *Dikeman v. Struck*, 76 Wis. 332, where, without reference to any of them, a different conclusion was reached, and reversal was refused on the ground that by appealing generally the defendant had conferred jurisdiction over his person. An examination of the briefs in that case discloses that appellant's attorney wholly omitted

to bring any of these authorities to the notice of the court, and wholly failed to suggest the second ground of reversal stated in *McConkey v. McCraney*, namely, that the judgment was erroneous for want of the statutory prerequisite of proof of service, even though jurisdiction in fact existed. It is inconceivable, therefore, that this court intended in that case to overturn so well-established a practice or to overrule so numerous and consistent a line of its own decisions. The subject obviously was not considered, and we feel bound to adhere to the general current of authority, and to hold that so far as *Dikeman v. Struck* conflicts with them it must be overruled.

Upon the face of the record, the judgment appealed from was without jurisdiction and in defiance of sec. 2891, Stats. 1898, and must be reversed.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

HILDMAN, Respondent, vs. THE CITY OF PHILLIPS, Appellant. 106 611 | 109 245

April 7 — April 27, 1900.

Municipal corporations: Injury from defect in street: Court and jury: Service of notice: Special verdict: Failure to submit material issue: Waiver: Positive and negative testimony: Instructions to jury.

1. In an action for personal injuries caused by plaintiff's falling, in the night time, into an excavation extending across where the sidewalk had been, the evidence is *held* sufficient to sustain findings of the special verdict that the hole was not properly and safely guarded at the time of the accident, that plaintiff did not know of its existence a short time prior thereto, and that he was not guilty of contributory negligence.
2. The accident in such case happened on the 8th of October, and the plaintiff testified upon direct examination that he personally served notice thereof on the mayor and city clerk the last of November, between Thanksgiving and December 1st, and that service on the mayor was made at his home, which was nearly a mile from

plaintiff's residence. On cross-examination, however, he testified that after the accident he remained in the house three or four months before he went out at all; that it was along in January or February when he commenced getting out of his house; and that he could not tell exactly when he served the notice. *Held*, that the question whether the notice was served within ninety days as required by sec. 1339, R. S. 1878, was for the jury.

3. Where a special verdict fails to cover a material controverted issue the defect is not waived by failure to request the submission of a proper question.

4. Where testimony merely negative in its character has been received, the court should upon request instruct the jury that such testimony is entitled to comparatively little weight as compared with the positive testimony of equally credible witnesses.

5. Questions as to whether the excavation was properly guarded, and whether the city was guilty of a want of ordinary care in not guarding it, having been submitted for special verdict, it was not error to refuse to submit specific questions as to the maintenance of a lighted red globe lantern on each side of the excavation.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

M. Barry, attorney, and *John Barnes*, of counsel, for the appellant, contended, *inter alia*, that the material and physical facts in respect to the maintenance of barriers, guards, lights, etc., were directly in issue by the pleadings, and the defendant was entitled to have such specific facts found by the jury. *Davis v. Farmington*, 42 Wis. 425–431; *Carroll v. Bohan*, 43 Wis. 218–221; *Eberhardt v. Sanger*, 51 Wis. 72; *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610–618; *Klochinski v. Shores L. Co.* 93 Wis. 417; *Pratt v. Peck*, 65 Wis. 463; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Bigelow v. Danielson*, 102 Wis. 470. The discretion of the trial court does not go to the extent of warranting a refusal to submit a question covering a material controverted fact. *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 39–57; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307. The finding in response to the seventh question of the verdict is at best but a conclusion of law without giving any of the facts upon which it is based.

For the respondent there was a brief by *H. C. Peters*, attorney, and *Sanborn, Gleason & Sleight*, of counsel, and oral argument by *Mr. Peters* and *Mr. E. F. Gleason.*

CASSODAY, C. J. This action was commenced February 5, 1898, to recover damages for personal injuries sustained by the plaintiff's falling into a ditch or trench running from the gutter on the west side of the street in towards the lot, and across where the sidewalk had been. The ditch or trench was dug October 8, 1894; and it is alleged that it was left on the night of that day with "no barriers, guards, lights, or signals of any kind or nature" about or near the same to warn travelers, and that the plaintiff on the evening of that day, and while the ditch was in such unguarded and unprotected condition, was traveling south where the sidewalk had been, and fell into the ditch and sustained the injuries in question. The defendant answered by way of admissions, denials, and counter allegations, and, among other things, to the effect, that at the time and place in question the defendant did keep and maintain "suitable barriers, railings, guards, protections, lights, and signals."

At the close of the trial, which occurred four and one-half years after the accident, the jury returned a special verdict (the first four questions being answered by the court, and the other six by the jury), and such verdict is to the effect (1) that on October 8, 1894, there was a hole or excavation six or eight feet long, two and one-half to three and one-half feet wide, and six or seven feet deep, made by authority of the defendant, for the purpose of making a connection with the water main, made the day of the accident, located on Lake street (one of the public streets of the city), commencing about nine feet from the west line of the street, and extending east, at right angles with the street, six or eight feet towards the center thereof, and north on the line with the north line of the block; (2) that the sidewalk along

Lake street had not been replaced and maintained since it was destroyed by the fire of July 27, 1894; nor until after October 8, 1894; (3) that the plaintiff was injured on the night of October 8, 1894, by falling into the hole or excavation mentioned; (3½) that the hole or excavation described was, in the night time, when not reasonably and properly safeguarded, a dangerous defect in Lake street for travelers using that street; (4) that the line of pedestrian travel for more than ten days prior to October 8, 1894, had been diverted, by the process of rebuilding stores on the west side of Lake street, into that portion of the street usually used by teams and vehicles; (5) that the plaintiff did not know of the hole or excavation mentioned, and of the condition of the same, a short time previous to the accident; (7) that at the time of the accident the hole or excavation was not properly and safely guarded by the defendant, so as to reasonably prevent accident to pedestrians passing along Lake street in the night time and in the exercise of ordinary care and caution; (8) that the defendant was guilty of a want of ordinary care in not safeguarding the hole, which was the proximate cause of the injury to the plaintiff; (9) that the plaintiff at the time of the happening of the injury in question was not guilty of a slight want of ordinary care which contributed directly to the happening of the accident; (10) that they assessed the plaintiff's damages at $2,000. From the judgment entered thereon the defendant brings this appeal.

It appears that the plaintiff was about fifty-eight years of age at the time of the accident. He was a tailor by trade, and had lived in the city for twelve years, and was then living in the southeast part of the city. About 7 o'clock on the evening in question he walked with the witness Wilson, who was the city clerk at the time, north towards the courthouse, and passed along by the ditch in question. Wilson testified that the plaintiff was very near-sighted, and so he took hold of his arm and led him across the bridge over the

ditch, and called his attention to the fact that it was dangerous for him to cross the ditch. The plaintiff testified that he walked five or six feet behind Wilson as they passed the place in question, but saw no hole; that he returned alone in about half an hour, on the trail where the sidewalk had been, and fell into the hole. There is considerable evidence to the effect that the hole or excavation was at the time of the accident properly and safely guarded, and especially that the dirt taken from the ditch was thrown out upon the north side of the ditch, forming a barrier, so as to reasonably prevent accident to pedestrians passing along that street in the night and in the exercise of ordinary care and caution. But the jury found the other way, and we are forced to the conclusion that there is evidence sufficient to support such finding. So we are forced to the conclusion that there is evidence sufficient to support the findings that the plaintiff did not know of the hole or excavation a short time prior to the accident, and was not guilty of contributory negligence.

The complaint alleged that on or about December 1, 1894, and within ninety days of the happening of such injuries, the plaintiff served upon the mayor of the city, and also upon the then clerk of the city, the notice required by sec. 1339, R. S. 1878. Such allegation was denied by the answer. It was admitted on the trial that a notice, sufficient in form, was served by the plaintiff personally, but the defendant did not admit that it was served within the time required. That made it necessary for the plaintiff to prove that such notice was so served within the ninety days. The only evidence on that question is the testimony of the plaintiff. On his direct examination he testified to the effect that he was sick, and so his woman went down to Medford, and had the notice drawn by a lawyer at that place; that he made no memorandum of the time of serving, and did not know just when it was made, but that he served it on the mayor and clerk the last of November, and between Thanksgiving and De-

cember 1, 1894; that he served it by giving it to the mayor at his house, which was nearly a mile from the plaintiff's house. On cross-examination he testified to the effect that after he was hurt he remained in his house three or four months, before he went out at all; that it was along in January or February when he commenced to get out of his house; that he was sure of that; that he did not know exactly when he served the notice; that he could not tell. Upon such evidence it cannot be said, as a matter of law, that the notice was served within ninety days of the time of the accident. It follows that the verdict did not determine all the material and controverted facts in issue, and hence is defective, and such defect was not waived by a failure to request the submission of a question which would cover such issue. *Sherman v. Menominee River L. Co.* 77 Wis. 14; *Orttel v. C., M. & St. P. R. Co.* 89 Wis. 130; *McFetridge v. Am. F. Ins. Co.* 90 Wis. 142; *Dugal v. Chippewa Falls*, 101 Wis. 536.

The seventh question submitted to the jury was as to whether the hole or excavation was properly and safely guarded. Upon that subject the court was requested to charge the jury that: "The evidence of witnesses to the fact that they passed over and along the street in the immediate vicinity of where the accident occurred shortly before or after the occurrence, and that they did not see any lights and barriers around the trench in question, is negative in its character, and is in itself entitled to comparatively little weight, as compared with the testimony of equally credible witnesses who testified to passing over and along the same street at or about the time, and to seeing lights and barriers around the trench. A person passing along a highway may not notice an object, although it exists, or, having noticed it, the impression thereby created may pass from his memory; and the testimony of such person to the effect that he did not see such an object carries little con-

viction, as against the testimony of an equally credible witness who testifies positively to having seen the object in question." The testimony of some of the witnesses on the part of the plaintiff was merely negative in its character, and hence the instruction so requested, or its equivalent, should have been given. What constitutes such mere negative testimony is well settled by this court. *Ralph v. C. & N. W. R. Co.* 32 Wis. 177; *Wittmann v. Watry*, 45 Wis. 494; *Pennoyer v. Allen*, 56 Wis. 502; *Hinton v. Cream City R. Co.* 65 Wis. 337; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 369; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157. The counsel for the plaintiff contends that, as to at least some of the plaintiff's witnesses, it was not a mere failure to observe, but that, according to their testimony, they passed over the ditch, where, if there had been barriers, they would necessarily have been obliged to stop and go around the barriers, or over them, and hence, under other rulings of this court, should have the weight of affirmative testimony. *Sobey v. Thomas*, 39 Wis. 317; *Berg v. C., M. & St. P. R. Co.* 50 Wis. 419; *Shekey v. Eldredge*, 71 Wis. 538; *Joannes v. Milderd*, 90 Wis. 68; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123. Had the instruction requested been given, it might have been proper to further instruct the jury as to the exceptions to the rule in respect to positive and negative testimony.

Error is assigned because the court refused to submit to the jury, in addition to the seventh and eighth questions, in regard to the hole or excavation being properly and safely guarded, two other questions,—one as to whether a "lighted red globe lantern" was maintained on the north side of the trench, and the other as to whether such lantern was maintained on the south side of the trench. It has very often been held that the form of the special verdict is very much in the discretion of the trial court. We have no purpose here of renew-

ing the discussion on the subject of special verdicts. It is enough to refer to some of the more recent decisions. Thus, it has been held that, "if the questions submitted to the jury cover all the issues, the refusal to submit questions covering the same issues, or any one of them, in a different form, or refusal to submit questions covering mere elements of such issues, is not error." *Schumaker v. Heinemann*, 99 Wis. 251. The seventh and eighth questions submitted manifestly covered the maintenance of such "lighted red globe lantern," and the court charged the jury in respect to maintaining suitable lights and barriers. The case is distinguishable from more recent cases where the trial court refused to submit to the jury questions put in issue by the pleadings. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 362; *Bigelow v. Danielson*, 102 Wis. 470. It is unnecessary to continue the discussion.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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BRUNETTE, Respondent, vs. THE TOWN OF GAGEN, Appellant.

April 9 — April 27, 1900.

Appeal: Exceptions: Instructions to jury: Special verdict: Duplicity: Injury from defective sidewalk: Negligence: Proximate cause.

1. The giving of general instructions in connection with a special verdict cannot be held error unless exceptions are preserved to the parts complained of.
2. It is not prejudicial error to instruct the jury that slight want of ordinary care constitutes negligence, nor, in the absence of a request therefor, to fail to define ordinary care.
3. Although instructions are subject to criticism because not confined to the fact to be found, an exception on the ground that they are in no manner applicable to the question submitted and fail to inform the jury of the law applicable thereto, is too broad to be available if they have, in fact, some applicability to such question.

4. When a traveler exercising ordinary care suffers injury by stepping into a defect in the sidewalk, which was made by the town officials, or had existed so long as to charge them with notice and the duty to repair, such officials cannot be heard to say that they did not anticipate such an occurrence. Where those facts are found in a special verdict, therefore, errors in the instructions relating to a further question as to proximate cause are immaterial.
5. If a question as to whether the defendant was guilty of negligence which was the proximate cause of plaintiff's injury is answered in the affirmative, there is no duplicity of which the defendant can complain.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This is an action for personal injuries suffered by the plaintiff by reason of a fall on an alleged defective sidewalk upon a highway of the defendant town, said highway being a street in the unincorporated village of Three Lakes, situated in said town. Upon the trial of the case, it appeared that prior to the 17th of December, 1897, for a considerable time, a sidewalk had been maintained on the east side of the highway in question, and that upon said last-named date a portion of the sidewalk about twenty-eight feet in length was removed by the chairman of the town board of the defendant, leaving an unguarded step of somewhere from seven to fifteen inches in height from that part of the sidewalk remaining down to the ground at each end of the space where such removal had taken place; that on the night of December 25th following such removal the plaintiff was passing along the street, and stepped off from one end of the sidewalk remaining, and was thrown to the ground, and suffered injuries which the testimony tended to show were permanent in their character. The plaintiff claimed that she had no knowledge of the removal of said portion of the sidewalk.

The following special verdict was returned by the jury: "(1) Was Michigan street, in the village of Three Lakes, on

and along the east side of block 2, in said village, one of the public highways of the defendant town, and opened to travel by vehicles and pedestrians, on the 25th day of December, 1897, and for a long time prior thereto? *By the Court:* Yes. (2) Was there a sidewalk on and along the east side of block 2 and on Michigan street, in the village of Three Lakes, which was generally used for foot travel along said street, on and for a long time prior to December 25, 1897? *By the Court:* Yes. (3) Did the chairman of the defendant town cause a portion of the sidewalk along the east side of said block 2 and in Michigan street, and about twenty-eight feet in length, to be removed, on or prior to December 17, 1897, and did said portion of said sidewalk remain out of its place until after January 1, 1898? *By the Court:* Yes. (4) Was due notice of the injury complained of served on the chairman of the defendant town on January 24, 1898? *By the Court:* Yes. (5) Did the plaintiff know of the removal of said portion of the sidewalk prior to the time she claims to have fallen in passing over said sidewalk, on the night of December 25, 1897? No. (6) Was the plaintiff injured on the night of December 25, 1897, by stepping off the sidewalk and down to the ground which was under the portion of the sidewalk that had been removed? Yes. (7) Was the plaintiff, at the time of the accident complained of, guilty of a slight want of ordinary care which contributed to the happening of the accident? No. (8) Did the removal of the portion of the sidewalk in question constitute such a defect in the highway at that place as to render it unsafe and dangerous to foot passengers passing along said sidewalk in the night time, in a northerly direction, and in the exercise of ordinary care? Yes. (9) Was the defendant town guilty of negligence in allowing the portion of the sidewalk in question to remain out of place at the time of the accident to the plaintiff, on the night of December 25, 1897, which negligence was the proximate cause of the injury to the

plaintiff? Yes. (10) If the court should be of the opinion, from your answers to the foregoing questions, that the plaintiff is entitled to recover, at what sum do you assess her damages? $900."

The defendant moved to set aside the verdict and for a new trial, but the motion was overruled, and judgment for the plaintiff rendered upon the verdict for the amount of damages assessed by the jury, and the defendant appeals.

For the appellant there was a brief by *F. J. & C. F. Lamb*, and oral argument by *C. F. Lamb*.

For the respondent there was a brief by *N. A. Colman* and *John Barnes*, and oral argument by *Mr. Barnes*.

WINSLOW, J. Upon the facts found by the special verdict there can be no doubt of the plaintiff's right of recovery; hence the only questions for serious consideration are whether the evidence was sufficient to sustain the findings, and whether any errors of law were committed in arriving at those findings. Upon the first question we deem it sufficient to say that, after reviewing the evidence, we are satisfied that there was ample evidence upon which the findings could be properly based.

Proceeding to the second question, several alleged errors must be discussed.

1. It is said that the court gave the jury general instructions upon the duties, obligations, and liabilities of the parties, and that this was error, because a special verdict only was to be rendered, citing *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. It may be doubtful whether the charge is open to the criticism made, but, conceding that it is, the objection cannot prevail, because no objection or exception was preserved to those parts of the charge complained of.

2. In submitting the seventh question, as to slight want of ordinary care by the plaintiff contributing to the accident,

the court charged, in substance, that this question should be carefully read and fully understood, and that the court must be informed by the verdict whether the plaintiff contributed to the accident by slight want of ordinary care, which in this case would be negligence on her part. It is said that this charge, in legal effect, instructed the jury as to the effect of their answer upon the plaintiff's right of recovery, and also that it is erroneous in not defining what is meant by ordinary care. We think the objections are somewhat hypercritical. To tell the jury that want of ordinary care constitutes negligence is certainly frequently done, and to hold such a statement to be prejudicial error would be imposing entirely too close and technical a rule upon the trial courts. It would have been better to have defined ordinary care, but, in the absence of a request for a definition, we cannot say that it is error to omit to define the term.

3. In submitting the eighth question, the court said, in substance, that the question related to the physical condition of the place of accident; that all travelers are expected to use ordinary care in passing along a street by day or by night, and have a right to rely upon the street being in a reasonably safe condition to persons exercising ordinary care; that the plaintiff had a right to assume that the sidewalk was in a reasonably safe condition for her to pass over in the exercise of ordinary care; so that the question should be answered "Yes" or No," according to the fact. The exceptions to these instructions were that they were in no manner applicable to the question and failed to inform the jury of the law applicable to the facts involved in the question. While it must be admitted that the instructions are subject to justifiable criticism in not being confined to the fact to be found, we think the exception is too broad to be available. The jury are certainly informed, in substance, that the town should keep the street in a reasonably safe

condition for use by persons exercising ordinary care, and it cannot be said that the instructions are in "no manner" applicable to the question.

4. As to the ninth question, it is objected that it is double, and that proximate cause was not properly defined. It may well be doubted whether this question was in any respect necessary. The jury had found an actionable defect in the street caused by the chairman of the town more than a week prior to the accident, by which the plaintiff was injured while exercising ordinary care as a traveler, and the argument would be strong that no further finding of negligence was necessary. Certainly, no question of proximate cause was left, because, when a traveler exercising ordinary care suffers injury by stepping into a defect in the sidewalk, which was made by the town officials, or had existed so long as to charge them with notice and the duty to repair the same, such officials cannot be heard to say that they did not anticipate such an occurrence. So, if there was error in the instruction as to proximate cause, it was harmless. As to the alleged double character of the question, it might be with some reason said to be double if the answer had been in the negative; but, when answered in the affirmative, there is no duplicity of which the defendant can complain, because, in order to so answer it, every jurymen must necessarily say that there was negligence which proximately caused the injury; the two elements cannot be severed.

5. It is contended that the verdict is excessive, but we are unable to say so from the evidence.

Other minor errors are alleged, but we have found nothing which can be deemed prejudicial or which requires treatment.

By the Court.— Judgment affirmed.

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EAU CLAIRE NATIONAL BANK, Appellant, vs. BENSON, Respondent.

April 9 — April 27, 1900.

Statutes: Construction: Stare decisis: *Corporations: Liability of stockholders to creditors: Remedies: Constitutional law: Self-executing provisions: Interstate comity.*

1. When a statute, requiring judicial construction, has received it by the highest court having jurisdiction in that regard, and such construction has been firmly established as correct, it is as much a part of the statute as if plainly written into it originally, and the court may properly decline to consider, thereafter, the subject of whether such construction was right or wrong.
2. The constitutional or statutory liability of stockholders of a corporation to its creditors, created by the laws of the state of Minnesota, must be held to be of the same nature here as by the highest court of such state.
3. It having been determined by the supreme court of Minnesota, that the constitutional liability of stockholders of a Minnesota banking corporation is of such a nature that it cannot be enforced by an action at law by one or any number of creditors against one or any number of stockholders, this court is bound thereby.
4. The term "self-executing," as applied to a constitutional or statutory provision in regard to an added liability of stockholders of a corporation to its creditors, has reference only to whether such a provision is enforceable without any specific remedy therefor given by the written law.
5. If a constitutional or statutory provision, regarding an added liability of stockholders of a corporation to its creditors, be self-executing, yet its nature be such that it cannot be enforced otherwise than by an action in equity in favor of all the creditors against all the stockholders, brought in the home jurisdiction where the corporation can be reached, it cannot be otherwise enforced either in the home or any other jurisdiction.
6. Judicial authorities in a state, regarding the added liability of stockholders under its laws, to the effect that it is enforceable at law by a single creditor against a single stockholder as an ordinary debt of the latter to the former, and authorities to the effect that such liability can be enforced in any jurisdiction where service can be obtained upon any stockholder, have no application whatever to a liability of a stockholder construed by the highest tribunal

of the state where it was created as one not enforceable except by an action in equity in favor of all the creditors of the corporation desiring to participate therein, against all the stockholders within the jurisdiction of the court.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to enforce the stockholders' liability to creditors under the laws of the state of Minnesota.

The constitution of the state of Minnesota provides that "each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mercantile business, shall be liable to the amount of stock owned or held by him." Art. X, sec. 3.

The Minnesota Elevator Company, a corporation organized under the laws of the state of Minnesota and having its principal office in Red Wing in said state, a debtor to a considerable amount for money borrowed in the regular course of business of plaintiff, a national banking corporation of the city of Eau Claire, Wisconsin, made an assignment September 2, 1884, for the benefit of its creditors under the laws of Minnesota, to which assignment all of the creditors of the assignor except plaintiff became parties, and by so doing, according to the laws of such state, released their claims against the assignor and without resorting to the stockholders' liability.

This action at law was commenced November 18, 1897, against the defendant, who was then and had been, during all the time covered by the transaction referred to, a resident of Minnesota, service being obtained upon him in this state, to enforce his liability as a stockholder of the elevator company under the constitutional provision before referred to. The issues formed by the pleadings involved several questions vital to the maintenance of the action, and among them whether the liability of stockholders of a Minnesota

corporation to its creditors is enforceable by an action at law or any action in the courts of this state.

That cause was tried by the court and the facts, as regards the nature of the liability in question, by the laws of Minnesota as construed by its highest court, were determined as follows:

The liability of stockholders of a Minnesota corporation, not within the exception contained in its constitutional provision on the subject, or some other special exception, none of which exceptions include the corporation in question, exists wholly by force of the laws creating it, and by such laws its character and incidents must be determined. It is a liability of all the stockholders to all the creditors, limited as to each stockholder to the amount of his stock. It is a liability for the benefit of all the creditors who desire to take advantage of it, each having an equal right with all the other creditors to enforce it. As between the stockholders and the corporation the latter is the primary debtor and liable to reimburse the former. As between the stockholders there is the right of contribution to the end that each stockholder within reach of the court having jurisdiction to enforce the liability will only be required to pay such proportionate share of the indebtedness of the corporation participating in the proceedings to enforce it as the amount of stock held by him bears to the entire amount of stock held by solvent stockholders within the jurisdiction of the court.

Chapter 76 of the general statutes of the state provides the exclusive remedy for the enforcement of such liability, which is by an equitable action in a district court within the state of Minnesota, all the creditors desiring to avail themselves of the liability being plaintiffs and the corporation and all its stockholders within the jurisdiction of the court being defendants. The nature of the liability of stockholders in corporations organized under the laws of Minnesota, including those specified and embraced in its constitutional

provision on the subject, the form and nature of the action and proceedings to enforce the same, and the courts having jurisdiction of such actions, have been fully determined by the supreme court of the state of Minnesota to the effect aforesaid, and that the remedy provided by chapter 76 of the Minnesota statutes is exclusive, and that it requires a single action in equity at the home of the corporation.

From such facts and others the court decided that it was without jurisdiction to entertain the action. Judgment was accordingly entered dismissing the plaintiff's complaint and for costs and disbursements in favor of defendant.

For the appellant there was a brief by *F. M. Miner*, attorney, and *H. B. Walmsley*, of counsel, and oral argument by *Mr. Miner* and *Mr. J. M. Olin.*

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, attorneys, and *Hahn, Belden & Hawley*, of counsel, and oral argument by *C. T. Bundy* and *W. J. Hahn.*

MARSHALL, J. No new question is presented for consideration on this appeal. Most of the questions discussed in the brief filed by counsel for appellant have been presented to this court over and over again and with the same result as when first presented some forty years ago. There must come a time when the presentation of a question to a court of last resort, and the consumption of its time in going over ground that has been repeatedly explored before, will be a mere waste of judicial labor. That period has been well-nigh, if not quite, reached in regard to the minor propositions underlying the ultimate question involved in this appeal. Courts are not responsible for the law. It is their province to declare and apply it and to construe statutes and constitutions in accordance with the will of the law-making power, where construction becomes necessary. When such construction has once been given to a law and finally established as a part thereof, it is as much a part of it as if

embodied therein in plain and unmistakable language. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. When that situation exists it is the province of the legislature alone to change the law. The court should not attempt it, whatever may be the notions of judges as to what the law ought to be. No matter what the situation may appear to be, as to the unjust operation of a law, courts should not struggle to change it as it has been understood to exist and has been plainly written into its decisions for years, or by fine distinctions between cases and, by rejecting the reasoning upon which they were grounded, as *obiter*, or by treating reasons given for a conclusion reached as to the intent of the lawmaking power as reasons given to justify an arbitrary construction of it, try to fit a decision to some case of peculiar hardship, so as to work out a supposed equitable result in that particular case or class of cases, that is really barred by the law, independent of the results of such struggle. That courts sometimes do that, and that it results in much confusion, uncertainty, and bad law, must be apparent to all who have to do, to any great extent, with its judicial administration; and it must be likewise apparent that the statutes, as they exist, whatever may be the hardships that result, should be declared and administered, leaving it to the lawmaking power to change them as the persons operating in that field may be advised.

The nature of the liability sought to be enforced in this cause is governed by the law of the state of Minnesota. To go elsewhere, into jurisdictions where stockholders' liabilities are held to be entirely different, only leads to confusion instead of to a right decision.

The law of Minnesota on the subject under discussion is substantially the same as that of this state. The nature of the liability of stockholders created by law here, was settled in *Coleman v. White*, decided in 1861 and reported in 14 Wis. 700; and though many cases have been presented to the

court since that decision, involving the same subject, no change has taken place in the conclusion there reached. That conclusion, in regard to the stockholders' liability created by the law of Minnesota, was adopted by the supreme court of that state in *Allen v. Walsh*, decided in 1879, reported in 25 Minn. 543, and it has been ever since adhered to by such court.

It was said, in effect, in the cases above referred to, that the added liability of stockholders is primary, contractual, and absolute; that it attaches the moment the debt of the corporation is contracted, and is of all stockholders to all creditors substantially on the same basis as the individual liability of partners to partnership creditors, subject to the limitation prescribed by the law creating the liability; that it cannot be enforced by any one creditor for his individual benefit, or at all at law, against a single or any number of stockholders, because every creditor has a right to participate in the benefits of it, as to every stockholder, in the proportion his claim bears to the entire corporate indebtedness so participating; that one creditor cannot, in any way, appropriate the liability of any stockholder for his own use, but must share it with all the creditors who desire to participate therein in the proper proceeding to enforce it; that the liability of all stockholders that can be reached in the proper jurisdiction must be enforced in a single action in equity, to the end that a fund may be accumulated for distribution among all creditors, in proportion to the amounts due to them respectively from the corporation, who may elect, after opportunity therefor, to take part in the suit. The decisions in this state and Minnesota, on this subject, have become so numerous and been so often and so recently cited and discussed, that it is useless to do more than to refer to the more important of them. *Coleman v. White*, 14 Wis. 700; *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Terry v. Chandler*, 23 Wis.

456; *Hurlbut v. Marshall*, 62 Wis. 590; *Gianella v. Bigelow*, 96 Wis. 185; *Booth v. Dear*, 96 Wis. 516; *Gager v. Bank of Edgerton*, 101 Wis. 593; *Gager v. Marsden*, 101 Wis. 598; *Foster v. Posson*, 105 Wis. 99; *Finney v. Guy*, *ante*, p. 256; *Allen v. Walsh*, 25 Minn. 543; *Arthur v. Willius*, 44 Minn. 409; *Merchants' Nat. Bank v. Bailey Mfg. Co.* 34 Minn. 323; *Willis v. Mabon*, 48 Minn. 140; *In re Martin's Estate*, 56 Minn. 420; *Hanson v. Davison*, 73 Minn. 454.

We repeat what was said in *Finney v. Guy* (*ante*, p. 256), that the added liability of stockholders, though of an individual character, as said in some of the decisions cited, is joint in respect to the manner in which it must be enforced, and is more like the liability of the members of a partnership to its creditors than to any other with which it may be compared, as said by DIXON, C. J., in *Coleman v. White*, 14 Wis. 700.

The laws of Minnesota and of this state are in harmony to the point that such an action as this cannot be maintained anywhere to enforce the liability of stockholders of a Minnesota corporation, created by law.

Controlling significance is claimed, in the brief of counsel for appellant, for the fact that the liability sought to be enforced is not a mere statutory liability, or a right given coupled with a remedy to enforce it, but is a right conferred by a self-executing provision of the Minnesota constitution,—self-executing in that it is complete without any legislation for its enforcement. *Willis v. Mabon*, 48 Minn. 140, is cited to our attention as conclusive on that point, but it does not militate at all against, but on the contrary supports, the proposition that the framers of the law did not intend that one creditor should be permitted to pursue an individual stockholder or any number of stockholders at law or otherwise, to enforce payment of his particular claim. All that *Willis v. Mabon* really decides is that the liability of stockholders to creditors, created by the Minnesota constitution,

is the same as that created by a statute in the same language, and that, where the right exists, if the written law does not give a remedy to enforce it, it can be enforced by such remedy as is within the power of the court to give, which is adapted to the nature of the right. The mere fact that the law of Minnesota gives an absolute right to the creditors of a corporation to pursue its stockholders, by no means carries with it a right as to every creditor to appropriate to his sole use the liability of any particular stockholder or stockholders.

After settling in the affirmative the question of whether the right exists, independent of a statutory method to enforce it, to pursue stockholders of a corporation to recover of them its indebtedness, we must yet determine the nature of the right; and that is answered by the Minnesota court in *In re Martin's Estate*, 56 Minn. 420, in an opinion by the learned judge who wrote the opinion in *Willis v. Mabon*. Such answer can be best stated in the language of the opinion: "Under this provision [of the constitution], all the stockholders are liable to all the creditors. The object is to create a common fund, limited in amount, for the benefit of all creditors. Hence, if one creditor is allowed to proceed alone, he might exhaust the fund, or get more than his share. This personal liability was evidently intended to provide for the contingency of a deficiency of corporate assets which remain the primary fund for the payment of corporate debts. Hence, it is evident, no action or proceeding can furnish a complete remedy, or protect the rights of all persons interested, except one which brings in all interested parties,— the corporation, all the stockholders, and all the creditors. And for these reasons the courts generally hold, and in the absence of any statutory provision, that to enforce such a liability, created for such a purpose, the only remedy is by an action or proceeding to which all those interested are made parties, so that the rights and liabilities

of all may be adjusted. The reasoning in *Allen v. Walsh*, 25 Minn. 543, is entirely applicable to the present case. There is no statute authorizing a single creditor to commence an action against a single stockholder to enforce this constitutional personal liability."

The effect of *Willis v. Mabon*, 48 Minn. 140, and *In re Martin's Estate*, 56 Minn. 420, is that the constitutional liability of stockholders of a corporation to its creditors in Minnesota is the same in all respects as if the liability were created by statute in the same language, and the same as the statutory liability of stockholders in this state, and that the nature of it is clearly defined in *Coleman v. White*, 14 Wis. 700, and *Allen v. Walsh*, 25 Minn. 543, and the numerous other decisions in this state affirming the doctrine of those cases. It would seem that one could not seriously contend that this action at law, of a single creditor against a single stockholder, can be maintained in Minnesota, in view of the plain declaration in *In re Martin's Estate, supra*, to the contrary, or that, if the action cannot be maintained in Minnesota, it can be maintained here.

There is nothing in *Hanson v. Davison*, 73 Minn. 454, or any other Minnesota case, in conflict with *In re Martin's Estate*, to the point that an original action at law cannot be maintained in Minnesota by one or any number of creditors against one or any number of stockholders of a corporation to enforce their liability added by law. It is as firmly established as law can be, by plain adjudications of the highest court having jurisdiction to declare it, that such an action as this cannot be maintained where the liability sought to be enforced was created, and that must prevail here on the most familiar of legal principles.

Now, as in cases heretofore where this court has been called upon anew to pass upon the nature of the liability of stockholders to creditors created by the law of this state or of Minnesota, a large number of cases are cited to our atten-

tion in each of which a stockholder's liability was enforced that was created by a law construed, by the highest judicial tribunal having jurisdiction in that regard, to create a right enforceable in an action at law by a single creditor against any stockholder, in any jurisdiction where jurisdiction can be obtained of his person or property. Such cases have no application whatever to a stockholder's liability of the nature of the one we are here considering. To refer to them where a liability of the latter sort is sought to be enforced, as before stated, only leads to confusion. If the law of a state create a liability of stockholders to creditors that may be enforced in the home jurisdiction as a mere debt of each stockholder to each creditor, it will have the same character everywhere. Such is not the nature of the constitutional liability of stockholders in Minnesota, as we have clearly shown. If the law of a state create an added liability of stockholders to creditors, enforceable only as a liability of all stockholders to all creditors, and so far only as may be reasonably necessary to satisfy the claims of creditors desiring to take the benefit of it, its character cannot be changed by proceedings in a foreign jurisdiction to enforce it, and it cannot be so enforced at all if the nature of the liability is inconsistent therewith or it is not permitted by the rules of interstate comity. *Finney v. Guy*, *ante*, p. 256.

By the Court.—The judgment of the circuit court is affirmed.

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EGGETT, Respondent, vs. ALLEN, Appellant.

April 9 — April 27, 1900.

Malicious prosecution: Damages: Evidence: Reputed wealth: Advice of counsel: Instructions to jury: Probable cause.

1. In an action for malicious prosecution, where punitory as well as compensatory damages are recoverable, the financial circumstances of the defendant may be shown by evidence of his reputed wealth. *Draper v. Baker*, 61 Wis. 450, followed.

2. Where justification under advice of counsel was not at issue in such a case, instructions to the jury based on the assumption that it was, thus distracting the attention of the jury from the real issue, were erroneous.
3. An instruction that probable cause, as relating to the commencement of a criminal prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a *really cautious* man in the belief that the person accused is guilty of the offense charged, is erroneous; and the error is not cured by correct expressions in the other portions of the charge, indicating that the standard of liability is the belief of a reasonably prudent man.
4. The giving of a proper instruction does not cure an erroneous one before given, unless the latter is expressly withdrawn or it is evident that no harm resulted therefrom.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This action is brought to recover damages for malicious prosecution. The complaint contains two counts,— one for the prosecution of plaintiff for obtaining property under false pretenses, commenced March 23, and terminated by his discharge on April 3, 1897; the other for a prosecution for embezzlement, which was commenced on April 3, 1897, and was terminated at the following term of the circuit court by the district attorney filing reasons for not filing an information. The answer was a general denial, with a specific denial that the defendant in any way caused the arrest or imprisonment of the plaintiff as charged. The action was tried by the court and jury, and verdict was rendered for plaintiff, in which they assessed his damages on the first cause of action at $50, and on the second at $350. The usual motion for a new trial was made and denied. Numerous exceptions to the introduction of evidence were taken by defendant, and exceptions filed to portions of the charge thought to be faulty. A judgment for plaintiff for the amount of the verdict and costs was duly entered, from which the defendant brings this appeal.

For the appellant there was a brief by *MacBride & MacBride*, and oral argument by *R. J. MacBride.*

For the respondent there was a brief by *J. R. & C. R. Sturdevant*, attorneys, and *Chas. F. Grow*, of counsel, and oral argument by *C. R. Sturdevant.*

BARDEEN, J. There seems to be no question but that it was shown upon the trial that plaintiff was arrested upon two criminal charges, as alleged, and that both had terminated favorably to him before this action was commenced. A suggestion is made by defendant that the justice's docket fails to show that the first action was criminal in its nature. We think this question is fully met by the papers in the case, and other evidence on the trial, and that the court properly treated both prosecutions as criminal.

Numerous objections to evidence were made by defendant, none of which is deemed of sufficient importance to require extended consideration, except the following: Several witnesses were called and permitted to testify as to the reputed wealth of defendant. The point is made, as stated in 1 Jones, Ev. § 160, that in case of a recovery for compensatory damages the evidence should relate to defendant's *reputed* wealth, and in case of exemplary damages the evidence should be as to defendant's *actual* pecuniary ability. There was no evidence in this case as to defendant's *actual* financial standing. It seems not to have been contested that, if plaintiff was entitled to recover at all, he was entitled to recover both compensatory and punitory damages. A discussion of the point here raised may be found in *Draper v. Baker*, 61 Wis. 450, in which the holding is adverse to the defendant's contention. We see no reason for departing from the rule laid down in that case. The other points as to the exclusion of evidence are not deemed to be of such harmful character as to require a reversal of the judgment or to require special comment.

The issue sharply outlined by the pleadings was whether the defendant did in fact authorize or institute the proceedings against the plaintiff. The usual defenses of want of malice, probable cause, or advice of counsel were not interposed. No attempt was made to justify the commencement of the prosecutions. True, the defendant testified that he consulted G. I. Follett, an attorney, in regard to a claim he had against the plaintiff; but he nowhere discloses what advice, if any, was given as to the prosecutions in question. Notwithstanding the entire absence of any testimony in the case on this subject, the court submitted it to the jury upon the assumption that the defendant was urging the advice of his attorney as a justification for having authorized or instituted the prosecution against plaintiff. He told the jury that if a party fully and fairly stated all of the material facts of the case to his attorney, and was by him advised that he had good grounds to proceed in a criminal prosecution, and he acted in good faith upon such advice, he was protected from an action for malicious prosecution. Then, again, he said to them: "How was he advised by the attorney? Did he fully and fairly state all the material facts to his attorney?"—etc. It is claimed that this introduced a foreign issue into the case, and that the prominence given it by the trial judge had a tendency to obscure or minimize the real issue, and was harmful to defendant. There seems to be good ground for this contention. The court assumed facts to exist which did not exist. The authorities are that it is clearly error to charge a jury upon a supposed or assumed state of facts, of which no evidence has been offered. Such instructions presuppose that there is some evidence before the jury which they may think sufficient to establish the facts thus assumed in the opinion of the court; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them.

2 Thomp. Trials, §§ 2295–2315; *U. S. v. Breitling*, 20 How. 252; *Michigan Bank v. Eldred*, 9 Wall. 544; *Baltimore v. Poultney*, 25 Md. 18. The issue of justification under advice of counsel was not in the case, and it was wrong to assume that it was, and thus distract the attention of the jury from the real issue presented.

The main facts involved were: Did the defendant commence or authorize the commencement of the prosecutions against plaintiff? And, if so, did he do so through malice and without probable cause? On the question of probable cause the court instructed the jury as follows: "'Probable cause' means a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a really cautious man in the belief that the person so accused is guilty of the offense charged." The objection urged is to the use of the words "really cautious." There is a line of cases, commencing with *Munns v. Dupont*, 3 Wash. C. C. 31, in which the definition of "probable cause" is as above stated, leaving out the adverb "really." *Richey v. McBean*, 17 Ill. 63; *Ash v. Marlow*, 20 Ohio, 119; *Cole v. Curtis*, 16 Minn. 182; *Center v. Spring*, 2 Iowa, 393. Even without the qualifying word, we are not satisfied with the definition given. When read with the context, the real substance of all of the definitions is that the acting party shall have a reasonable ground for belief. The belief must be that of a reasonable and prudent man, and all that can be required of him is that he shall act as a man of ordinary caution and prudence would be likely to act under the same circumstances. *McCarthy v. De Armit*, 99 Pa. St. 70. We adopt the language of Mr. Justice STERRETT in *McClafferty v. Philp*, 151 Pa. St. 86, wherein he says: "There is at least a shade of difference in the meaning between the words 'cautious' and 'prudent.' The former suggests the idea of timidity, or, as Webster gives its secondary meaning, 'overprudent; fearful; timorous.' A man is cautious chiefly as

the result of timidity." The definition given by Chief Justice SHAW in *Bacon v. Towne*, 4 Cush. 217, comes nearest fixing the liability upon a reasonable basis of any found in the books. He says: "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty." Even if the definition in *Munns v. Dupont* should be approved, the use of the word "really" in the instruction given serves to emphasize the word which it qualifies to such an extent as to give the jury a false idea of the defendant's liability. It is true, the court in other portions of the charge used expressions indicating that the standard of liability was the belief of a reasonably prudent man, but this did not cure the error. At the very best, the jury were left in confusion as to the proper standard. The giving of a proper instruction does not cure an erroneous one before given, unless the latter is expressly withdrawn or it is evident that no harm resulted therefrom. See *Imhoff v. C. & M. R. Co.* 20 Wis. 344; *Little v. Superior R. T. R. Co.* 88 Wis. 402.

For the errors thus noted the judgment must be reversed and the cause remanded for a new trial.

By the Court.— So ordered.

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ALLEN, imp., Appellant, vs. FRAWLEY, imp., Respondent.

April 9 — April 27, 1900.

Attorneys at law: Fraud: Conspiracy: Action, at law or in equity? Trusts and trustees: Survival of actions.

1. Wilful misstatements of the law by attorney to client to secure an advantage to himself, with knowledge of the falsity and intent to defraud on the one side and ignorance and reliance on the other, constitute actionable fraud.

2. A complaint alleged a conspiracy between defendants and one other person to obtain by fraud from plaintiffs' testatrix and ancestor her note secured by mortgage on land, for the purpose of selling the same and dividing the proceeds between the conspirators; the obtaining and sale of the note and mortgage accordingly; the foreclosure of the mortgage by the purchaser; the purchase of the land by the defendants at the foreclosure sale, and their retention of the same and collection of the rents; and a deficiency judgment, paid by plaintiffs. The prayer was that defendants be compelled to convey the lands to plaintiffs, or that plaintiffs recover the value thereof, and also the amount of the judgment paid by them and the rents. *Held*, that the action was in equity to charge defendants as trustees and to enforce the trust, although a portion of the relief demanded was not obtainable in such an action; and that the cause of action survived the death of the *cestui que trust.*
3. For the amount paid on the deficiency judgment, or for the loss of the land through the foreclosure of the fraudulently acquired mortgage, the recovery would necessarily be in a tort action, but any right to that form of action died with the mortgagor.
4. The conspiracy as alleged was consummated when the note and mortgage were sold and the proceeds divided by the conspirators, and to recover such proceeds plaintiffs' testatrix had a clear and adequate remedy at law by an action *ex contractu* for money had and received.
5. The events subsequent to the sale of such note and mortgage were not within the scope of the conspiracy as alleged, nor was it shown that plaintiffs could not have prevented them by paying the mortgage or defending against its foreclosure. On the demurrer of a defendant whose only connection with the fraud, as alleged, was by said conspiracy, it is *held* that the complaint fails to connect such fraud with the acquisition of title to the land so as to charge defendants with a trust therein, and fails therefore to state any cause of action for equitable cognizance.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Appeal from order sustaining general demurrer of *Thomas F. Frawley* to the complaint, which sets forth the following material facts: Plaintiffs are the executors and all the heirs at law of one Mary Allen, deceased, who died May 6, 1894. In 1892 she, desiring certain steps with reference to her de-

ceased husband's estate, consulted *Thomas F. Frawley*, who instituted administration proceedings, and procured the appointment of the defendant R. K. Boyd. *Thomas F. Frawley* associated with himself in the attorneyship for Mary Allen his brother, William Frawley, and notified her thereof. Upon her inquiry why the business did not proceed, the two defendants and William Frawley having, as alleged, entered into a conspiracy "to fraudulently obtain from said Mary Allen a note secured by mortgage upon real estate, for the purpose of selling the same and dividing the proceeds among themselves," William Frawley, accompanied by Boyd, visited her and fraudulently represented to her that she must execute and deliver to him her note in the sum of $1,300, secured by mortgage on real estate, and, to overcome her reluctance, fraudulently represented to her that the laws of Wisconsin would not permit them to conduct or go on with the case unless they had their pay or were secured for it, and that in case they were not so secured or paid the court would ask them if they had their pay, and if they said not the court would dismiss the case, and further represented that a note and mortgage given for attorney's fees would not be negotiable, and they would not be able to transfer the same; and said William Frawley promised, as an inducement and consideration for the making of said note and mortgage, that he and his brother would proceed and take certain steps with reference to rights in property of the deceased husband, and promised to attach to the note and mortgage a writing declaring the services to be performed. Said fraudulent statements were made by said William Frawley in pursuance of said conspiracy, with knowledge of their falsity, and for the purpose of deceiving Mary Allen and inducing her to execute and deliver the note and mortgage, and without intention of doing anything therefor for her benefit. She, relying upon said statements and putting confidence in the Frawleys and

said Boyd, as administrator, made a note and mortgage for $1,300 to William Frawley, upon certain premises in Chippewa Falls, of the alleged value of $2,500. None of the services were performed. In May, 1893, before the maturity of the note and mortgage, for a valuable consideration, said William Frawley sold and indorsed the same without recourse to one P. J. Bolin, who in July, 1895, commenced foreclosure suit, to which these plaintiffs were made parties and appeared and interposed defense. Judgment of foreclosure and for a deficiency was entered in November, 1895, and in January, 1897, the premises were sold at foreclosure sale, and were bid off by the defendants Boyd and *Thomas F. Frawley* for the sum of $1,800, leaving a deficiency of $177, for which judgment was entered, and which plaintiffs have since paid. At the time of the commencement of the suit said Boyd and *Frawley* still held the premises, having collected the rents thereof since the 5th day of February, 1897. The proceeds of the sale of the note and mortgage to Bolin were divided between the defendants *Thomas F. Frawley* and R. K. Boyd and said William Frawley.

The prayer is for judgment that said Boyd and *Thomas F. Frawley* be compelled to convey to the plaintiffs the premises, and, in case that could not be done, that plaintiffs have judgment for the value of the premises in the sum of $2,500; also, for the $177 paid upon the deficiency judgment; also, for the rents and use and occupation of said premises, and for general relief.

For the appellant the cause was submitted on the brief of *Vesper Morgan.* To the point that an attorney is to be regarded, in all his relations with his client, as acting in a fiduciary capacity, and that transactions between them by which the attorney is benefited will be set aside unless clearly shown by the attorney to have been either just and fair or purely voluntary on the part of the client, he cited *Hughes v. Willson*, 128 Ind. 491; *Petrie v. Williams*, 68 Hun,

589; *Alaniz v. Casenave*, 91 Cal. 41; *Cheney v. Gleason*, 125 Mass. 166; *Emery v. Parrott*, 107 Mass. 95; *Ormond v. Hutchinson*, 13 Ves. 47, 51; *Beaumont v. Boultbee*, 5 Ves. 485; 1 Story, Eq. Jur. §§ 218, 219; *Goodrich v. Smith*, 87 Mich. 1; *Taylor v. Barker*, 30 S. C. 238; *Smith v. Smith*, 45 N. Y. St. Rep. 591; *Cotrill v. Krum*, 100 Mo. 397; *Ford v. Harrington*, 16 N. Y. 285; *Whitehead v. Kennedy*, 69 N. Y. 462; *Schuttler v. Brandfass*, 41 W. Va. 201; *Butler v. Prentiss*, 158 N. Y. 49; *Brooks v. Martin*, 2 Wall. 70, 82; *Mason v. Ring*, 2 Abb. Pr. N. S. 322; *In re McDermit*, 63 N. J. Law, 476.

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*.

DODGE, J. Respondent seeks to support his demurrer on several grounds, some of which require but brief discussion:

1. He contends that this is an action *ex delicto* to recover damages for deceit, and therefore does not survive. *John V. Farwell Co. v. Wolf*, 96 Wis. 10; *Lane v. Frawley*, 102 Wis. 373. We cannot agree with this view. The complaint is entitled to a liberal construction. Sec. 2668, Stats. 1898. So construed, it fairly presents a purpose and attempt to charge the acquisition of property by fraud, and to obtain, not so much the damages thereby caused the plaintiffs' decedent, but a return to them of that which the defendant has fraudulently obtained and holds,—in other words, to charge defendant with the character of a trustee for her, and to enforce the trust. Such a suit in equity survived the death of the *cestui que trust* at common law. *Cheney v. Gleason*, 125 Mass. 166. Its survival is not dependent upon sec. 4253, Stats. 1898. True, certain relief prayed is not within the scope of such a suit,—as, for example, recovery of the $177 paid to Bolin on deficiency judgment, which is strictly damage to the deceased, and recoverable only in an action in tort; but excessive demand for relief is not ground for demurrer (*Hawley v. Tesch*, 72 Wis. 299), and it is not suf-

ficient here to overcome the rest of the pleading and destroy the general purpose above stated.

2. It is claimed that no legal or actionable fraud is set forth, in that the inducements alleged for the making of the mortgage are either promises to perform future acts or misstatements of law. We need not, for the purposes of the question before us, discuss whether fraud may ever be predicated upon a promise of future performance; for this complaint alleges wilful misstatement of the law by attorney to client to secure an advantage to himself, with knowledge of the falsity and intent to defraud on the one side, and ignorance and reliance on the other. This allegation is a most serious one to be made against any attorney, but we must remember that as yet it is only an unproved assertion, taken for true only in a technical sense, for the purpose of applying rules of law on that assumption. Whatever may be the rule as to intentional misstatements of the law as between persons upon parity with each other, we cannot for a moment assent to the proposition that courts of equity or law are not to protect the trusting client against such acts on the part of her attorney. In the whole realm of business transactions hardly any act presents more of moral turpitude nor more likelihood of effective fraud than the intentional and self-profiting misinformation as to the law from a trusted attorney to his client, relying on him, as she must, for guidance and protection. It is gratifying to find few, if any, cases where the direct question has been passed on by courts. That fact speaks eloquently the response which lawyers, English and American, have given to the high responsibilities thrust upon them by the opportunities and temptations of their confidential and influential relations with their clients. Courts have hardly had to deal with anything more aggravated than omission to advise clients against the attorney's own interest, or honestly mistaken statements of the law; but there has been, as a rule, no

hesitation in declaring even these sufficient to defeat transactions from which the attorney benefits at the expense of his client.

Thus, Story (1 Eq. Jur. § 219) says: "If an attorney employed by the party should designedly conceal from his client a material fact or principle of law by which he should gain an interest not intended by the client, it will be held a positive fraud, and he will be treated as a mere trustee for the benefit of his client and his representatives. And in a case of this sort it will not be permitted to the attorney to set up his ignorance of law or his negligence as a defense or an excuse. It has been justly remarked that it would be too dangerous to the interests of mankind to allow those who are bound to advise, and who ought to be able to give good and sound advice, to take advantage of their own professional ignorance to the prejudice of others. Attorneys must, from the nature of the relation, be held bound to give all the information which they ought to give, and not be permitted to plead ignorance of that which they ought to know." *Gibbons v. Hoag*, 95 Ill. 45, 70; *Cleine v. Englebrecht*, 41 N. J. Eq. 498, 502; *Bulkley v. Wilford*, 2 Clark & F. 102, 177; *Miles v. Ervin*, 1 McCord, Eq. 524; *Ryan v. Ashton*, 42 Iowa, 365; *De Rose v. Fay*, 4 Edw. Ch. 40, 44; *Rogers v. R. E. Lee M. Co.* 9 Fed. Rep. 721; *Baker v. Humphrey*, 101 U. S. 494, 502; Pomeroy, Eq. Jur. 960.

This court is not disposed to relax or confuse the niceties of a code of ethics which for so many centuries has, with few exceptions, protected and justified the intrusting of vast property rights and most sacred interests to the care of lawyers, without thought or precaution as to their pecuniary responsibility. And we hold that the allegations of misrepresentation and misstatement of rules of law, if proved as set forth, would constitute actionable fraud.

3. Our greatest difficulty with this complaint arises upon the question whether it alleges that a situation such as war-

rants generally the relief demanded, or any equitable relief, has resulted from the fraud alleged. Apparently the pleader did not clearly conceive the distinction between those damages to the plaintiffs or their decedent which might justify and form a part of the recovery in a tort action, and the acquisition of specific property by the defendants upon which a constructive trust may be imposed. Among the former might perhaps fall the loss of the mortgaged property through the enforcement of a fraudulently acquired mortgage, if the facts making such loss probable were known to the defendants taking such mortgage; but, as has already been said, any right to that form of action died with Mrs. Allen. In this case the only connection of the respondent, *T. F. Frawley*, with the alleged fraud is by conspiracy. The specific acts were all committed, as asserted, by another. The scope and extent of that conspiracy is defined by the complaint to have been to "fraudulently obtain from said Mary Allen a note secured by a mortgage on real estate, for the purpose of selling the same and dividing the proceeds among themselves." The mortgage was so sold and the proceeds received divided by the alleged conspirators, and thereby the whole purpose of the fraud and of the conspiracy set forth was accomplished. The proceeds of that conspiracy acquired by the defendants were their respective shares of the money for which the mortgage was sold. To reach these Mrs. Allen required no aid from a court of equity. Her remedy in an action at law *ex contractu* for money had and received was clear and adequate to secure to her all that equity could give, namely, payment of such money.

The subsequent events, namely, the failure of Mary Allen and of the plaintiffs to pay said mortgage, the foreclosure thereof, the offering of the mortgaged property at public sale, and the purchase and acquisition thereof for a new and approximately adequate consideration paid by defendants, are not by the complaint suggested to have been within the

scope of the conspiracy or the contemplation of the conspirators. Neither is it alleged that the plaintiffs might not readily have prevented them, either by paying the mortgage or by setting up its fraudulent character as a defense in the foreclosure action, where, if proved, it would have been effective, unless Bolin purchased without notice,— a fact not alleged. The fact that the defendants purchased at the foreclosure sale is not significant. The loss to the plaintiffs is not thereby enhanced, nor is the benefit derived by defendants from the mortgage thereby increased. If profit is made on the land, it results from an advantageous purchase in the open market, and at public sale, at which all others, including plaintiffs, had equal opportunity. True, all these conditions might also exist had there been a corrupt conspiracy to acquire the real estate of the decedent, involving direct misrepresentation, not only in inducing the execution of the mortgage, but involving also the purpose and intent to pass that mortgage to an innocent holder, and through a foreclosure sale to effect transfer of the premises; and in such case there might, perhaps, be recovery of the property. But in absence of allegations we cannot assume such a conspiracy. Fraud must be clearly and specifically pleaded, both as to the acts accomplishing the deceit and as to the injury caused thereby,— the fraudulent result. Story, Eq. Pl. §§ 251, 252. We are constrained to hold that the complaint fails to connect the alleged deceit practiced on Mary Allen with the acquisition of title to the real estate by defendants, so as to charge them with a trust therein, and, by reason of such failure, is not sufficient to state any cause of action for equitable cognizance.

By the Court.— Order sustaining demurrer is affirmed.

LOWE, Respondent vs. RING, Appellant.

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s115 579

April 10 — April 27, 1900.

Limitation of actions: Attorneys at law: Termination of employment: Evidence: Corporations: Compensation of officers for special services: Implied contracts: Estates of decedents: Agreement by creditor to pay administrator: Public policy.

1. The statute of limitations does not commence to run upon an attorney's claim for services until the termination of the proceeding in which they were rendered, where his employment was to conduct such proceeding to its termination, or until the employment is otherwise terminated. Thus, evidence tending to show that an attorney was employed to collect certain notes by suit; that the action was tried several times but no result reached; that a reference as to one branch of the case was agreed on; that the case lay dormant for more than six years in this condition, when a trial was had before the referee, conducted by said attorney; and that thereafter he was advised by the client to take no further steps,—is *held* sufficient to justify a finding by a jury that the employment was entire and did not terminate until after the trial before the referee.
2. So, evidence tending to show that in 1881 or 1882 a bank placed a note in an attorney's hands for collection; that he procured from the maker an assignment of a life insurance policy as collateral; that in order to perfect the collateral he brought an action to compel the issuance of a paid-up policy, which was settled by its issuance; and that he retained the policy and the note as an uncompleted collection until 1897, when he surrendered it to the president of the bank upon the assurance that he would be paid for his services,—is *held* sufficient to sustain a finding that there had been no termination of the employment, at least until the surrender of the policy.
3. Where services are rendered to a corporation by one of its officers, which are clearly outside of his official duties, a recovery may be had therefor under implied contract, if the circumstances be such as to fairly imply that it was expected that the services were to be paid for; and in considering whether such implied contract was proven, or whether the services were rendered gratuitously, the nature of the corporation and its business, the extent and character of the services, the comparative amount and value of the services of other officers, the extent of the officer's interest in the corporation, as well as all the other surrounding circumstances, are to be considered.

4. Where a bank is creditor of the estate of a decedent, and vitally interested in a wise administration thereof, it may contract, either expressly or by implication, to pay one of its officers for his services as administrator of the estate.

APPEAL from a judgment of the circuit court for Clark county: A. J. VINJE, Judge. *Reversed.*

This action was commenced December 31, 1897, and was brought to recover upon six promissory notes executed by the defendant at various times to the Clark County Bank, a banking corporation located at Neillsville, Wisconsin. The defendant is an attorney at law who has been practicing at Neillsville for more than twenty-five years, and by his answer he admitted the execution of the notes sued upon, but pleaded as a defense to all except two of said notes the statute of limitations. As to the two notes last mentioned, he alleged by his answer that the plaintiff became the owner thereof after maturity, and with knowledge that the defendant had a setoff and counterclaim thereto. As such setoff and counterclaim, he further pleaded that the bank while it held said notes was indebted to him for legal services performed at its request, for commission on loans secured by him for its benefit, and for salary as president thereof, to an amount exceeding the notes. To this counterclaim the plaintiff replied by a general denial, and further by allegations to the effect that all services rendered by the defendant to said bank were rendered gratuitously and because the defendant was an officer of the bank; and the plaintiff also pleaded the statute of limitations as a defense to the counterclaim.

Upon the trial the plaintiff abandoned all causes of action save those based upon the two notes to which the defendant had not pleaded the statute of limitations, and upon those two notes it was agreed by the parties that $2,806.99 was the gross amount due, and the trial proceeded upon the issues arising by the defendant's counterclaim and the reply

thereto. Certain facts in the case were undisputed, and among them are the following:

The Clark County Bank was a state banking corporation, and was incorporated in October, 1875, with 220 shares of stock, of the par value of $100 each; the defendant was not a stockholder when the bank was incorporated, but became such two or three years later, and in 1890 owned eighty shares of stock. He was president of the bank from April 8, 1889, to July 1, 1895. He sold his stock about July 1, 1896. From July, 1876, to January, 1891, the defendant practiced law at Neillsville with Mr. C. A. Youmans, under the firm name of Ring & Youmans. In 1878 or 1879 the firm of Ring & Youmans was appointed attorneys for the bank, and thereafter transacted all of the bank's legal business, until the dissolution of the firm, upon which dissolution the business of the firm was transferred to *Mr. Ring*, and thereafter *Mr. Ring* acted for the bank in its legal matters. While so acting he performed services for the bank in two cases,—*Archer v. Clark County Bank* and *Hewitt v. Clark County Bank*,—for which he was not paid; and the amounts claimed by him as due for those services were allowed by the jury as a setoff, so that no further mention need be made of them.

As to three other litigated matters for which the defendant claimed compensation of the bank, some further statement of the evidence will be necessary. One of these litigated cases was that of *Clark County Bank v. Robert Christy*, which was an action brought to recover upon two notes in 1883 or 1884. The action was tried once in Clark county, resulting in a verdict for the defendant, which was reversed by this court; a second time in Clark county, resulting in a verdict for the defendant, which was set aside, and the case transferred, on change of venue, to Columbia county, where the case was again tried, resulting in a verdict for the defendant, which verdict was also set aside.

These trials occurred some time prior to April, 1889, and soon thereafter, upon stipulation, one branch of the case was referred to a referee; but nothing was done under the reference for more than six years, when a hearing was had before the referee, whose report in favor of the plaintiff was confirmed in the latter part of the year 1895. The defendant's evidence tended to show that *Mr. Ring's* services in this case were reasonably worth from $800 to $900, and that his services before the referee were worth from $50 to $75. These latter services, only, the circuit court permitted to go to the jury; holding that the claim for services upon the trials of the case was barred by the statute of limitations.

The second action in which *Mr. Ring* rendered services for the bank, and for which he claimed to be allowed compensation in the counterclaim herein, was that of *Clark County Bank v. J. S. Kirkland et al.* It appears that Mr. Kirkland prior to 1881 had been vice-president of the bank, and then left the bank, indebted to it upon a note of $1,000, which he was unable to pay. The evidence tended to show that this note was placed in *Mr. Ring's* hands for collection, and that while so holding it he obtained from Mr. Kirkland and his wife, as collateral thereto, the assignment of a $10,000 life insurance policy on the life of Mr. Kirkland. As a means of making this assignment effective as collateral, *Mr. Ring* commenced a suit in the circuit court for Clark county against Mr. Kirkland *et al.* (including the insurance company) to compel the company to transfer to the bank a paid-up policy for its surrender value. This action was brought some time between 1880 and 1883, and was not brought to trial, but was settled by the company issuing a paid-up policy to the bank in 1884 or 1885. Thereafter, *Mr. Ring* testifies, he retained the note and the policy in his possession until August, 1897, at which time Mr. Youmans, then president of the bank, asked *Mr. Ring* for the policy,

or the purpose of realizing some money on it for the benefit of the bank; and *Mr. Ring* gave it to him, stating that he did not wish to waive any claim that he might have for services by surrendering it, and Mr. Youmans stated that he would be paid whatever was right. The testimony tended to show that *Ring's* services in this matter were reasonably worth $250.

The third matter in which *Ring* claims to be entitled to recover compensation for legal services was the settlement of the estate of Levi Archer. The evidence tended to show that Levi Archer was president of the Clark County Bank from 1881 up to the time of his death, April 6, 1889, when he died intestate. It was found that he was indebted to the bank in the sum of $29,000, being $7,000 in excess of the paid-up capital of the bank. At the time of his death, Mr. Archer owned ninety-six shares of the stock in the bank; *Mr. Ring*, fifty-six shares; and the remaining shares were owned by Thomas Hewitt. Ten shares of *Ring's* stock, however, stood in the name of Mr. C. A. Youmans. Upon ascertaining the facts of Mr. Archer's indebtedness to the bank, *Mr. Ring* was in favor of closing the bank and paying its debts; but the other parties interested were opposed to this, and thought that Mr. Archer's estate should be managed by some one connected with and interested in the bank, so as to save as much as possible to apply on the indebtedness to the bank. The testimony showed further that *Mr. Ring* was elected president April 18, 1889, to succeed Mr. Archer, and held this office until 1895; that upon request of the other officers of the bank he accepted the position of administrator of the Archer estate in the summer of 1889, and proceeded to reduce the estate to cash. The agreement, as claimed by *Ring*, under which he did this work was not in writing but was, in effect, that all the moneys realized from the estate should be paid into the bank; that the bank should pay in full all other creditors;

that the claim of the bank should next be paid in full; and that whatever was left, if anything, of the estate should be turned over to Mrs. Archer and her son Frank, who were Mr. Archer's heirs; and that the bank should pay all the expenses of administration, including a reasonable compensation of *Mr. Ring* for his services. The testimony further tended to show that Mrs. Archer and Frank agreed to this arrangement; that *Mr. Ring* proceeded to administer the estate, and collected and paid out over $60,000; that the creditors other than the bank were paid in full; that the principal upon the bank's claim was paid in full, but that it lost all interest thereon; that Mr. Ring has been paid nothing for his services as administrator, except $40. The court ruled, as matter of law, that *Mr. Ring* was not entitled to any compensation for his services in settling the Archer estate.

The testimony further showed that prior to Archer's death one Hill had recovered judgment against him, and that after his death the bank directors, upon the consideration of the matter, directed *Mr. Ring* to take an appeal to the supreme court, which he did, and argued the case in this court, and claimed that his services were reasonably worth $225. This claim the court also took from the jury, holding that *Mr. Ring* was entitled to no compensation for these services.

The court submitted to the jury the question whether the defendant was entitled to any salary as president, excluded from the jury the question of consideration for his services in the Christy case, the Kirkland case, the settlement of the Archer estate, and the case of *Hill v. Archer*, but allowed the jury to settle the value of the services upon final reference of the Christy case, and also the value of the services in the two cases before mentioned of *Hewitt v. Clark County Bank* and *Archer v. Clark County Bank*. The jury returned a verdict by which they assessed the plaintiff's damages at $2,806.99, and allowed the defendant $405 for attor-

ney's fees; leaving a balance in favor of the plaintiff of $2,401.99, for which sum judgment was rendered, and the defendant appeals.

For the appellant there was a brief by *S. M. Marsh*, attorney, and *Olin & Butler*, of counsel, and oral argument by *J. M. Olin*.

For the respondent there was a brief by *L. M. Sturdevant* and *Chas. F. Grow*, and oral argument by *Mr. Sturdevant*.

WINSLOW, J. The trial court held, as a matter of law, that the defendant could not be allowed anything (1) for the services in the action against Christy, except the services before the referee, because the claim was outlawed; (2) for services in the action against the Kirklands, for the same reason; (3) for services as administrator in the settlement of the Archer estate, because no valid contract to pay for the same was shown; and (4) for services upon the appeal in the case of Hill against the Archer estate, because the bank never authorized him to defend that case in any proper manner. Proper exceptions were taken to these rulings, and they are assigned as errors upon this appeal.

1. As to the statute of limitations: The rule which is established with substantial uniformity by the decisions is that the statute does not commence to run upon an attorney's claim for services and disbursements until the termination of the proceeding in which they were rendered, where his employment was to conduct such proceeding to its termination, or until the employment is otherwise terminated. Weeks, Att'ys (2d ed.), § 344, and cases cited; *Mygatt v. Wilcox*, 45 N. Y. 306; *Johnston v. McCain*, 145 Pa. St. 531; *Davis v. Smith*, 48 Vt. 52. Applying this rule to the services rendered in the Christy and Kirkland cases, it is quite apparent that it cannot be said, as matter of law, that the statute of limitations had barred either claim.

In the Christy case the defendant's evidence tends to show that the employment was to collect certain notes by suit;

that the action was tried several times, but no result reached; that a reference as to one branch of the case was agreed on; that it lay dormant for more than six years in this condition, until finally a trial was had before the referee, which took place in 1895, and which was conducted on behalf of the bank by the defendant; and that after this trial he was advised by the then president of the bank to take no further steps in the case. This evidence would certainly justify a finding by the jury that the defendant's employment was entire, and did not terminate until after the trial before the referee.

In the Kirkland case the defendant's evidence tended to show that in 1880 or 1881 the bank placed Kirkland's note in the defendant's hands for collection; that he procured from Kirkland and his wife an assignment of a life insurance policy, as collateral to the note; that in order to perfect the collateral he brought an action to compel the issuance of a paid-up policy to the bank, which action was not tried, but was settled by the issuance of the paid-up policy to the bank, which policy was retained by the defendant, together with the note to which it was collateral, as an uncompleted collection, until August, 1897, when he surrendered the policy to the president of the bank upon his assurance that he should be paid for his services. Had *Mr. Ring* simply been employed to bring an action to obtain the issuance of a paid-up policy of insurance, the statute of limitations would undoubtedly have commenced to run upon his claim for services from the time when the action was settled and the policy was obtained; but if his employment was to collect the note, and the obtaining of the insurance policy was simply a step in the course of that employment, then we think the statute would not begin to run until his employment to collect the note was terminated, and, under the defendant's evidence, there seems to have been no such termination of the employment,— at least, until August, 1897.

2. As to whether there was any evidence which would

sustain a verdict that there was an obligation to pay defendant for his services in the settlement of the Archer estate: These services were rendered while the defendant was president of the bank, and the view of the trial court seems to have been that under these circumstances there must be shown an express contract made by the directors with the defendant, in order to entitle him to recover. These services were no part of the defendant's duties as president of the bank, and the rule undoubtedly is that where services are rendered to a corporation by one of its officers, which are clearly outside of his official duties, a recovery may be had therefor under implied contract, if the circumstances be such as to fairly imply that it was expected that the services were to be paid for. *Corinne M., C. & S. Co. v. Toponce*, 152 U. S. 405; *Bartlett v. Mystic River Corp.* 151 Mass. 433. In considering whether such implied contract was proven, or whether the services were rendered gratuitously, the nature of the corporation and its business, the extent and character of the services, the comparative amount and value of the services of other officers, as well as all the other surrounding circumstances, are to be considered. *Bartlett v. Mystic River Corp., supra.* The plaintiff claims that there was no sufficient testimony in the present case to show that an express contract was made by the proper officers of the bank to pay the defendant for his services in the Archer estate matter, and, indeed, the testimony seems quite slender; but, conceding that there was no testimony which would justify a finding of express contract, the question still remained whether the circumstances were such as to raise an implied contract.

The suggestion was made that the bank had no power to make a contract to pay an administrator of an estate for his services, because the administrator could obtain his pay in the county court out of the estate, and that a contract to pay him by a creditor would be contrary to public policy.

We have been unable, however, to appreciate the force of this argument. Were there any antagonism between the interests of the creditor and the legal duties of an administrator, the argument would be strong, but there is not. The interest of the creditor is to have the estate prudently administered, to the end that the greatest possible sum should be realized from it, and this is the duty of the administrator. In the present case the bank was vitally interested in the wise administration of Archer's estate. Its claim was very large, and the claims of all other creditors, combined, were very small. By a prudent administration, it seemed that its claim might probably be secured in full, and, if the president of the bank acted as administrator, all funds would pass through the bank. The advantages of a friendly administration were obvious, nor was such an administration inimical to the interests of the estate. Our statute recognizes the right of the principal creditors to administration after the surviving husband or widow and next of kin have neglected to apply. (Sec. 3807, Stats. 1898.) Doubtless, the fact that the appellant was largely interested in the bank (being at that time the largest individual stockholder), and the fact that he was entitled to obtain his pay from the assets of the estate through the county court, should be considered in determining the question whether a contract directly by the bank to pay him for his services in the administration of the estate, and in the appeal in the case of *Hill v. Archer*, should be implied; but these facts would not prevent the making of an express contract for payment, nor the implication of a contract in the absence of an express contract.

Upon the whole case, we think the court was in error in withdrawing the various claims referred to in this opinion from the consideration of the jury, and hence that a new trial of the case is necessary.

By the Court.— Judgment reversed, and action remanded for a new trial.

GATES, Respondent, vs. RAYMOND, Appellant.

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April 10 — April 27, 1900.

Sale of chattels: Rescission for fraud: Restoration of consideration.

The general rule, that if a sale or agreement be made by means of fraud, the injured party, not being guilty of laches sufficient to estop him, may rescind the same and treat the agreement or sale as void upon condition of his restoring the wrongdoer to his former position, is subject to this exception, among others: If the defrauded person, by reason of the wrongful conduct of the wrongdoer, is rendered incapable of fully restoring the latter to his former position, to that extent such restoration is not necessary to a rescission of such sale or agreement.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Clark county: A. J. VINJE, Judge. *Reversed.*

Action of replevin, the subject of which was a horse. Plaintiff claimed to have obtained the horse of defendant in a horse trade, which the latter claimed was a fraudulent and illegal transaction and insufficient to vest any title to the property in plaintiff. On the trial the court refused to allow defendant to prove his defense of fraud under a general denial, whereupon the answer, by permission of the court, was amended by alleging, in effect, that September 14, 1898, defendant was the owner of the property in controversy; that on such day, for the purpose of cheating and defrauding defendant out of such property, the plaintiff gave him large quantities of intoxicating liquor and encouraged and induced him to partake thereof till he was wholly incapable of doing any business, and then consummated his fraudulent purpose in the following manner: Plaintiff and one or more associates acting in his interest proposed to defendant that they play the game of cards called poker, plaintiff offering to aid defendant in obtaining money with which to enter the game by trading horses and giving him

$20 to boot. Such proposal and offer were accepted by defendant, and the parties then spent a considerable time together playing the proposed game, resulting in plaintiff and his associate or associates winning from defendant the $20 paid to him as aforesaid and also the right to the horse which he was to get of plaintiff. The trade was not actually consummated by delivery of the horses.

The court ruled that the trade was a transaction independent of what occurred afterwards; that the defense of fraud as pleaded was insufficient for want of facts showing that defendant had restored plaintiff to his former position; that the gambling transaction itself was not a defense, because the horse in question was not lost by defendant in such transaction. Evidence offered to establish both of such defenses was excluded, and defendant's counsel duly excepted thereto.

There was evidence to the effect that plaintiff and defendant agreed to trade horses, plaintiff to have from the defendant the horse in controversy and to give defendant a particular horse and $20; that the money was paid; that defendant never had possession of the horse he was to get from plaintiff; that plaintiff obtained the horse he was to have from defendant by taking it from the latter's premises during his absence, claiming that defendant authorized the act; that defendant retook the horse from plaintiff's premises and had the property in his possession at the time of the commencement of this action; that the value thereof was $50, and the value of its use while detained from plaintiff was $30.

The court directed a verdict in plaintiff's favor on such evidence, and judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *L. M. Sturdevant* and *R. F. Kountz*, and oral argument by *Mr. Sturdevant.* To the point that it was not necessary, under the circum-

stances, to return or offer to return what he received in the horse trade, before defending in the action, they cited Cobbey, Replevin, § 418.

For the respondent there was a brief by *MacBride & MacBride* and *J. R. & C. R. Sturdevant*, and oral argument by *R. J. MacBride*. They contended, *inter alia*, that a party who would rescind a purchase of personal property on the ground of fraud or drunkenness must show that he returned or offered to return all the property received by him. *Becker v. Trickel*, 80 Wis. 484; *Hyslip v. French*, 52 Wis. 513; *Grant v. Law*, 29 Wis. 99; *Wilbur v. Flood*, 16 Mich. 40; *Carpenter v. Rogers*, 61 Mich. 384; *Baird v. Howard*, 22 L. R. A. 846, 849; *Thackrah v. Haas*, 119 U. S. 499. There is nothing to show that it is out of the power of appellant to restore the property received from respondent. Any other $20 would pay back the money. If appellant lost the horse for which he traded in the manner claimed, nevertheless he was still the owner thereof, and could reclaim the same from the winner, or recover its value.

MARSHALL, J. The judgment appealed from must be reversed because the court excluded the evidence offered to prove that plaintiff by fraud induced defendant to agree to trade horses and was guilty of such action in carrying out his fraudulent scheme that defendant was rendered incapable of restoring him to his former position as a condition of rescinding such agreement.

The trial court was guided by the general rule that a transaction consummated by fraud of one of the parties thereto, to the injury of the other, is not absolutely void, but is voidable upon condition of a restoration of the wrongdoer to his former position.

Such condition is equitable in its nature; therefore, necessarily, it goes no further than good conscience requires. That limitation admits of several important exceptions,

many of which will be found distinctly pointed out in *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, one of which exactly fits the facts pleaded in the answer in this case. It is this: When a wrongdoer has, by his own act, put it out of the power of his victim to restore him to his former position, he cannot profit thereby. In such circumstances the injured party may, upon doing all that he reasonably can under the circumstances to restore the wrongdoer to his former position, reclaim of him all the benefits which he obtained from the wronged party as the result of the trade. *Guckenheimer v. Angevine*, 81 N. Y. 394; *Merchants' Nat. Bank v. Tracy*, 77 Hun, 443; *Hammond v. Pennock*, 61 N. Y. 145; *Masson v. Bovet*, 1 Denio, 69; Kerr, Fraud & M. (2d ed.), 371.

Reference is usually had in the books to *Masson v. Bovet* as containing an accurate statement of the exception particularly mentioned. Such statement is as follows: "The restoration is not exacted on account of any feeling of partiality or regard for the fraudulent party. The law cares very little what his loss may be, and exacts nothing for his sake. If, therefore, he has so entangled himself in the meshes of his own knavish plot that the party defrauded cannot unloose him, the fault is his own; and the law only requires the injured party to restore what he has received, and, so far as he can, undo what had been done in the execution of the contract. That is all that the defrauded party can do, and all that honesty and fair dealing require of him. If these fail to extricate the wrongdoer from the position he has assumed in the execution of the contract, it is in no sense the fault of his intended victim, and, upon the principles of eternal justice, whatever consequences may follow, they should rest on the head of the offender alone." The idea is that the wrongdoer cannot insist, as a condition of rescission, on a return of that which, by his fraud, the wronged party does not control.

This is sound doctrine. If the plaintiff here, as alleged, as a part of a fraudulent scheme to rob the defendant of his property, induced him to drink intoxicating liquor until he was incapable of taking care of himself in a business transaction, and then, with knowledge of such situation and intentionally taking advantage thereof, plaintiff induced defendant to agree to trade horses and participate with him and his confederates in gambling at cards to the end that, by reason of defendant's condition of intoxication he would lose to his associates, or some of them, the property plaintiff gave or agreed to give him for his horse, and such end was accomplished as so designed, the defendant being thereby rendered incapable of restoring plaintiff to his former position as a condition of rescinding the horse trade, such restoration was not necessary to such rescission. There is no circumstance in such a situation to sustain a claim that defendant ratified the trade, and the law will not aid plaintiff in protecting himself by his own wrong from the consequences of his plot, whatever the loss to him may otherwise be.

The trial court properly ruled that the facts alleged to the effect that the horse trade was made in order to enable the defendant to participate in gambling, did not constitute a defense. The horse in controversy was not won from defendant in the gaming transaction, so sec. 4532, Stats. 1898, under which a person may recover money or property lost by playing or waging on any game, does not apply. Neither was the horse transferred or agreed to be transferred to the plaintiff as security or as a part of any contract involving security for money advanced for the purpose of gambling, so as to render the transaction void under sec. 4538.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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GAGAN, Respondent, vs. THE CITY OF JANESVILLE, Appellant. SAME, Appellant, vs. SAME, Respondent.

April 11—April 27, 1900.

(1) *Appeal: Orders: Identification of papers.* (2) *Municipal corporations: Injury from defective sidewalk: Notice: Description of defect: Variance.*

1. Upon appeal from an order which contained no recitation of or reference to the records and papers used upon the application therefor, the clerk's return contained the order and, under the same cover, the application therefor and an affidavit; the application making reference to the entire record, the bill of exceptions, and the annexed affidavit. The clerk certified that "the annexed order . . . notice, and undertaking on appeal" were all the originals filed in his office. *Held*, not a sufficient identification of the papers relied upon on the hearing of the motion to warrant entertainment of the appeal.
2. The notice of an injury, given to a city under sec. 1339, Stats. 1898, and the complaint in an action therefor stated in substance that the plaintiff was thrown down and injured by reason of her foot going into a hole in the sidewalk, and specifically described the defect as consisting of a missing board or plank from the sidewalk, which caused a deep hole therein. On the trial she testified to the absence of the board and the resulting hole in the sidewalk, but her testimony further showed that her injury was caused by a loose and slanting board upon which she attempted to walk and which "jumped up" or "rocked," turning her foot and causing it to go into the hole. *Held*, that this failed to show a causal connection between the fall and the defect specified in the notice and complaint, and that a verdict for defendant should have been directed.

APPEALS from a judgment and an order of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Judgment reversed; appeal from order dismissed.*

An action for personal injury claimed to have been suffered by the plaintiff upon a defective sidewalk of the defendant city on May 15, 1895. The notice served on the city on August 13, 1895, and the complaint described the de-

fect as consisting of "a missing board or plank from the sidewalk or footway, which caused a deep hole and depression in said sidewalk, extending about seven feet easterly and westerly along the center of said sidewalk, and about ten inches wide," and alleges that the plaintiff was violently thrown down "by reason of her foot going into a hole in said sidewalk, and under the planks or boards forming part of the covering of said sidewalk, . . . which fall and injury were caused by the defects and insufficiencies in said sidewalk as hereinbefore set forth."

The only evidence of the accident was given by the plaintiff herself, and was as follows: "There were three boards (longitudinal) in the sidewalk where I was injured, and the middle board was out; and I walked in carefully by the fence, not thinking about anything; and the board inside was going up,— used to raise up,— and I slipped off of it, and fell down in the hole." Again: "The walk was all broke and full of nails and splinters near the point where I was injured. The boards were about seven or eight inches wide. Couldn't tell exactly. They were narrow boards. Where the middle board was gone out, the hole left was six or seven inches from the level of the boards, and there was a kind of slant on the inside and outside boards that you couldn't walk on." She further testified: "At the place where I fell on this walk the boards were lengthwise, and there were three narrow boards, and the middle one was out,— about six or seven feet of it. I attempted to pass on the board nearest the fence. I thought I would go careful,— just go the same as I always did; and then I stepped on the board. The board jumped up. It was kind of loose. My right foot slipped off. It went down in the hole that the board was out." And again: "As I came along the street that morning, I was walking careful as I could. I thought I would pass the same as I did many times before, and when I came to this board I stepped on the board, and

it kind of rocked, and turned my foot a little, and I fell out in this hole. I was thrown out against the other board. *Q.* Did your foot go into the hole where the board was missing? *A.* Yes, sir. The board kind of slanted and threw me out."

At the close of the plaintiff's testimony defendant moved for a nonsuit on the ground that the evidence established contributory negligence, which was denied, and after all the testimony was in defendant moved for the direction of a verdict in its favor, which motion was also denied, exceptions being duly reserved. The refusal of these motions are the only errors assigned, no motion for a new trial or to set aside the verdict having been passed on by the court. Verdict was rendered and judgment entered in favor of the plaintiff, from which the defendant appeals.

A motion was made by the plaintiff to strike out the bill of exceptions, and was denied. From this order the plaintiff appeals. The order of denial contains no recitation or reference to the records and papers used or read by either party upon the application. The clerk has returned the order, and, under the same cover with it, an application therefor by the plaintiff and an affidavit of plaintiff's attorney; the application making reference to the entire record, the bill of exceptions, and the annexed affidavit. The clerk's certificate is merely "that the annexed order denying motion to strike out bill of exceptions, notice, and undertaking on appeal are all the originals filed in my office." The defendant moved to dismiss the plaintiff's appeal.

J. J. Cunningham, for the plaintiff.

F. C. Burpee, city attorney, for the defendant.

Dodge, J. The plaintiff's appeal from the order refusing to strike out the bill of exceptions must be dismissed for want of proper certificate from which this court can be assured what records and papers were relied on by each party on the

hearing of said motion. *Carpenter v. Shepardson*, 43 Wis. 406; *Glover v. Wells & M. G. Co.* 93 Wis. 13; *Hoffman & B. Mfg. Co. v. Burdick*, 95 Wis. 342; *Tenney v. Madison*, 99 Wis. 539; *Superior C. L. Co. v. Superior*, 104 Wis. 463.

The defendant contends that a verdict should have been directed in its favor for several reasons. Careful reading of plaintiff's testimony, all of which relating to the subject is set forth in the statement of facts, convinces us that it wholly fails to show any causal connection between her fall and the defect specified in her notice and complaint, namely, the hole in the sidewalk, resulting from the missing board. She nowhere testifies that stepping into that space caused her to fall, but, noticeably, more than once narrates her accident without reference to the fact that her foot went into the hole at all. On the contrary, her testimony shows quite clearly that her injury was due to another and distinct defect,—to a loose and slanting board, which "jumped up," or "rocked, and turned my foot." For results of that defect plaintiff of course cannot recover. She neither mentioned nor hinted at it even by any general language in her notice to the city required by sec. 1339, Stats. 1898; and, even if that difficulty were overcome, she has offered no evidence either that it was known to the officers of the defendant or that it had existed at all before the time of her injury. Proof of a defect and of an injury which *might* have been caused thereby is not enough. The plaintiff must show by reasonably direct evidence that the defect, and not something else, caused the injury. *Hyer v. Janesville*, 101 Wis. 371, 377, where we said: "Where there is no direct evidence of how an accident occurred, and the circumstances are clearly as consistent with the theory that it may be ascribed to a cause not actionable as to a cause that is actionable, it is not within the proper province of a jury to guess where the truth lies and to make that the foundation for a verdict." We are constrained to the conclusion that

there was not evidence to carry the case to the jury upon the question above discussed, and that the circuit court therefore erred in denying defendant's motion for direction of verdict, for which reason the judgment must be reversed.

Upon the questions of contributory negligence and of the time of the accident, also argued, we think the evidence was sufficient to justify their submission, but consider discussion of such evidence unnecessary in view of possible changes upon the new trial which must be ordered.

By the Court.—Plaintiff's appeal dismissed. On defendant's appeal, judgment reversed and cause remanded for a new trial.

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ABATEMENT of action. See ACTION, 1, 2, 4, 5. BANKS AND BANKING, 9. CORPORATIONS, 13.

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1. An action for damages for deceit does not survive at the common law, nor under any statute of this state, and therefore is not assignable. *Killen v. Barnes,* 546
2. Sec. 4253, Stats. 1898, which provides that actions for damages done to real and personal estate shall survive, refers only to damages to specific property, not to cheats and frauds resulting in pecuniary loss. *Ibid.*

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Discontinuance: Substitution of plaintiff.

3. The service and filing, by plaintiff, of a notice of discontinuance does not of itself, without judicial action thereon, terminate the action and deprive the court of all jurisdiction therein. The court may

and should consider the effect of a discontinuance upon the rights of others, and for the protection of such rights may deny an application for leave to discontinue, and may substitute another plaintiff. A remark in *Noble v. Strachan*, 32 Wis. 314, overruled. *State ex rel. Milwaukee v. Ludwig*, 226

At law or in equity? See EQUITY, 3.

4. A complaint alleged a conspiracy between defendants and one other person to obtain by fraud from plaintiffs' testatrix and ancestor her note secured by mortgage on land, for the purpose of selling the same and dividing the proceeds between the conspirators; the obtaining and sale of the note and mortgage accordingly; the foreclosure of the mortgage by the purchaser; the purchase of the land by the defendants at the foreclosure sale, and their retention of the same and collection of the rents; and a deficiency judgment, paid by plaintiffs. The prayer was that defendants be compelled to convey the lands to plaintiffs, or that plaintiffs recover the value thereof, and also the amount of the judgment paid by them and the rents. *Held*, that the action was in equity to charge defendants as trustees and to enforce the trust, although a portion of the relief demanded was not obtainable in such an action; and that the cause of action survived the death of the *cestui que trust*. *Allen v. Frawley*, 638

5. For the amount paid on the deficiency judgment, or for the loss of the land through the foreclosure of the fraudulently acquired mortgage, the recovery would necessarily be in a tort action, but any right to that form of action died with the mortgagor. *Ibid.*

6. The conspiracy as alleged was consummated when the note and mortgage were sold and the proceeds divided by the conspirators, and to recover such proceeds plaintiffs' testatrix had a clear and adequate remedy at law by an action *ex contractu* for money had and received. *Ibid.*

7. The events subsequent to the sale of such note and mortgage were not within the scope of the conspiracy as alleged, nor was it shown that plaintiffs could not have prevented them by paying the mortgage or defending against its foreclosure. On the demurrer of a defendant whose only connection with the fraud, as alleged, was by said conspiracy, it is *held* that the complaint fails to connect such fraud with the acquisition of title to the land so as to charge defendants with a trust therein, and fails therefore to state any cause of action for equitable cognizance. *Ibid.*

Tort or contract? See ACTION, 5, 6.

8. A complaint alleged that plaintiff had hired from one of the defendants, a liveryman, a hearse and carriage to be used at the funeral of plaintiff's child, and had paid therefor; that both defendants, with a malicious design to humiliate and injure plaintiff, entered into an agreement to deprive him of the use of the hearse and carriage and to cause them to be taken away from his residence at about the instant they would be needed to convey the child's body and attending friends to the grave; and that they carried out such design, thereby causing great mental distress to plaintiff, besides the loss of the amount paid by him. *Held*, that the action was one sounding in tort and not for breach of contract. *Gatzow v. Buening*, 1

ADMINISTRATORS AND EXECUTORS. See CORPORATIONS, 7. ESTATES OF DECEDENTS. WILLS.

ADVERSE POSSESSION.

See EQUITY, 1, 2.

1. Under sec. 4211, Stats. 1898, relating to adverse possession of land under claim of title founded on a written instrument, good faith in making such claim is not essential to render the possession adverse. *McCann v. Welch*, 142

2. Under a conveyance to him ostensibly executed by his wife a husband took possession, immediately after the wife's death, of a cultivated farm which she had owned, and five days later the deed was recorded. For more than ten years thereafter, claiming title under the deed, he held complete possession of the land either by personal occupancy or by leasing, and also gave a mortgage thereon, which was recorded. Independently of the deed he was entitled to hold the premises by right of curtesy, and two children of the wife by a former husband were also entitled to possession as tenants in common with him immediately upon the death of their mother, but they never received any share of the rents or rental value of the land. *Held*, that as against such children the possession of the husband was adverse, under sec. 4211, Stats. 1898. *Ibid.*

3. Actual, hostile, exclusive occupancy of land, completely dispossessing the true owner, without any presumption or claim of right, will ripen into title, under sec. 4207. Stats. 1898, if continued for the requisite period. *Illinois Steel Co. v. Budzisz*, 499

4. Such an occupancy of land does not, before the expiration of the period within which the owner may reclaim possession, constitute any estate or interest in the land, nor is the substitution of another occupant, to continue the dispossession of the true owner, the transfer of any such estate or interest, within the meaning of sec. 2302, Stats. 1898. The privity, therefore, between successive occupants, which is necessary to continue the dispossessed condition of the true owner and unite the connecting possessions of such occupants into one continuous adverse possession referable to the first entry, does not require a written conveyance but may be based upon a mere oral authorization of the succeeding occupant to take the place of his predecessor. *Ibid.*

AGENCY. See MASTER AND SERVANT, 1-3.

AMBIGUITY. See COURT AND JURY, 1.

AMENDMENT of pleading. See APPEAL, 18. PLEADING, 2, 8.

ANIMALS.

See BAILMENTS.

1. The evidence in this case — showing, among other things, that after plaintiff's sheep had been killed by two dogs the tracks of one of them were traced to defendant's house and that the appearance of his dog was incriminating — is *held* sufficient, with the accompanying circumstances, to sustain a verdict that defendant's dog was concerned or engaged in the killing. *Nelson v. Nugent*, 477

2. Under sec. 1620, Stats. 1898 (providing that "the owner or keeper of any dog which shall have . . . killed, wounded or worried any . . . sheep or lambs shall be liable to the . . . owner of such animals for all damages so done," etc.), if dogs of different owners unite in killing or worrying sheep each owner is liable for the whole amount of the damage so done. *Ibid.*

APPEAL AND ERROR.

From what appeal may be taken: Orders.

1. An order refusing to set aside the service of the summons and complaint on a foreign corporation is not appealable. *Welsher v. Libby, McNeil & Libby,* 291
2. An order cannot be treated as a judgment for the purposes of appeal merely because it imposes costs of motion. *Ibid.*

Notice of appeal: Separate judgments.

3. The "separate" judgments entered pursuant to sec. 2609, Stats. 1898, against the defendants in a consolidated action upon insurance policies issued by different companies, cannot be brought up for review by a single notice of appeal. *Montgomery v. Am. Cent. Ins. Co.* 543

Vested rights: Dismissal of appeal: Change in requirements.

4. Upon the dismissal of an appeal for lack of the certificate required by sec. 3047, Stats. 1898, in case of a judgment involving less than $100, the rights of the parties did not become vested or finally determined so as to preclude another appeal. *Blonde v. Menominee B. S. L. Co.* 540
5. It was competent for the legislature to dispense with the requirement of such a certificate, even as to judgments entered prior to the change. *Ibid.*

Return on appeal: Judgment roll: Identification of papers.

6. An appeal from a judgment will be dismissed unless a judgment roll satisfying the requirements of sec. 2898, Stats. 1898, has been transmitted to this court as required by sec. 3050. *Sutton v. C., St. P., M. & O. R. Co.* 225
7. An order refusing to dissolve an attachment, and the order to show cause upon which it was based, each recited that it was based on certain specified papers and the records and files in the case. On appeal the clerk certified that the papers annexed were "the original and all the papers and pleadings filed" in his office "in the above-entitled cause," except certain pages of the record which were certified to be true copies. *Held,* sufficient to identify the records and papers upon which the order was based. *Binder v. McDonald,* 332
8. Upon appeal from an order which contained no recitation of or reference to the records and papers used upon the application therefor, the clerk's return contained the order and, under the same cover, the application therefor and an affidavit; the application making reference to the entire record, the bill of exceptions, and the annexed affidavit. The clerk certified that "the annexed order . . . notice, and undertaking on appeal" were all the originals filed in his office. *Held,* not a sufficient identification of the papers relied upon on the hearing of the motion to warrant entertainment of the appeal. *Gagan v. Janesville,* 662

Record: Bill of exceptions.

9. A refusal to receive documents in evidence cannot be held error if the record on appeal contains no authentic information as to their contents. *Dodge v. O'Dell's Estate,* 296
10. If it appears from the judgment roll that a judgment dismissing the complaint proceeded upon the insufficiency of the complaint to state a cause of action, a bill of exceptions showing further how

that question was raised is unnecessary to present it for review on appeal. *Iron River v. Bayfield Co.* 587

Questions considered: Exceptions.

11. Under sec. 3070, Stats. 1898, if an order refusing to set aside a verdict and grant a new trial is made a part of the record by the bill of exceptions, the supreme court, on appeal from the judgment, may pass upon the sufficiency of the evidence to sustain the verdict, although no exception was taken to said order. *Morris v. National Protective Society,* 92

12. Omission to instruct as to the burden of proof cannot be considered on appeal, when no request to supply such omission was made at the trial. *Bergman v. Hendrickson,* 434

13. Separate exceptions to almost every word in the charge to the jury will not be held bad as being a general exception to the whole charge; but it is the better practice to except only to such portions of the charge as raise a reasonable question as to its correctness or applicability to the case. *Thomas v. Parrott,* 605

14. The giving of general instructions in connection with a special verdict cannot be held error unless exceptions are preserved to the parts complained of. *Brunette v. Gagen,* 618

15. Although instructions are subject to criticism because not confined to the fact to be found, an exception on the ground that they are in no manner applicable to the question submitted and fail to inform the jury of the law applicable thereto, is too broad to be available if they have, in fact, some applicability to such question. *Ibid.*

16. An order, reciting that the issue of law raised by the demurrer to the complaint came on to be heard and was argued by counsel, and directing that the complaint be dismissed with costs and that judgment be entered accordingly, was followed by a judgment reciting the order and dismissing the complaint. There was no written demurrer. A bill of exceptions showed that evidence had been taken before a referee and reported to the court before the making of the order for judgment, and did not show that the oral objection to any evidence under the complaint, made before the referee, had been renewed before the court. *Held,* that the judgment was an adjudication merely of the insufficiency of the complaint, and that an appeal therefrom presented that question only for review. *Iron River v. Bayfield Co.* 587

Review of discretionary action.

17. Where the trial court has power, in its discretion, to do an act, a refusal to exercise such discretion on the ground that it has no such power is an error of law for which the order will be reversed; but the supreme court will not determine in what way such discretion should be exercised. *Binder v. McDonald,* 332

18. The allowance of an amendment to a pleading under sec. 2830, Stats. 1898, will not be held an abuse of discretion on appeal if it has some reasonable ground to support it in view of the facts; and the legal presumption is that it has such ground until the contrary is made to appear. *Illinois Steel Co. v. Budzisz,* 499

Affirmance and reversal: Material and immaterial errors. See CRIMINAL LAW, 5–11, 13. ESTATES OF DECEDENTS, 2. EVIDENCE. FALSE IMPRISONMENT, 2–5. JUDGMENT, 2. MALICIOUS PROSECUTION, 2, 3. MUNICIPAL CORPORATIONS, 16, 24. SALE OF CHATTELS, 4. VERDICT, 1–3, 7.

19. As a general rule a judgment will be affirmed on appeal unless prejudicial error is made to appear affirmatively. Errors should be

definitely assigned and a good-faith attempt made to present them to the court; and where the claim is that a finding of fact is contrary to the evidence, the evidence or want of evidence bearing on the question should be brought to the attention of the court. *Franke v. Mann*, 118

20. On appeal a judgment cannot be reversed for want of evidence to support the verdict on which it is based, unless it clearly appears that there is no credible evidence which, in the most favorable view that can reasonably be taken of it, will support the verdict. *Nicoud v. Wagner*, 67

21. Refusal to discharge a juror on challenge for cause is not a prejudicial error, where the juror was removed on peremptory challenge, and no objection was made to the jury as finally impaneled. *Bergman v. Hendrickson*, 434

22. It is not prejudicial error to instruct the jury that slight want of ordinary care constitutes negligence, nor, in the absence of a request therefor, to fail to define ordinary care. *Brunette v. Gagen*, 618

23. The giving of a proper instruction does not cure an erroneous one before given, unless the latter is expressly withdrawn or it is evident that no harm resulted therefrom. *Eggett v. Allen*, 633

24. In determining whether a charge to the jury contains prejudicial error, consideration should be directed to the charge as a whole and as the jury must have understood it, and not to isolated sentences and clauses. *Bartell v. State*, 342

Appeal from county board. See COUNTIES, 1, 4.

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25. If the bond given on an appeal to the circuit court from a common council fails to comply with the requirements of the city charter, the city officers cannot by approving the bond waive the objection and confer jurisdiction of the subject matter upon the court. *Oshkosh Water Works Co. v. Oshkosh*, 83

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ATTORNEYS AT LAW.

See CRIMINAL LAW, 10, 14.

1. Sec. 2591*a*, Stats. 1898 (providing that any person having or claiming a cause of action sounding in tort or for unliquidated damages may contract with any attorney to prosecute the same and give him a lien thereon as security for his fees, and that when notice of

such agreement shall have been given to the opposite party or his attorney no settlement shall be valid as against said lien), does not authorize a splitting up of a cause of action without the consent of the wrongdoer or debtor and the maintenance of an independent action by the attorney to recover his fees, but in case of a settlement between the parties without the consent of the attorney his remedy is in the original action, which he may prosecute to final judgment in his own behalf as though no settlement had been made. *Smelker v. C. & N. W. R. Co.* 135

2. A notice in such a case merely stating that the claimant had given the attorney a lien upon the cause of action as security for his fees is *held* insufficient to charge the person against whom the claim is made with notice of an assignment of a specific interest therein. *Ibid.*

3. Persons holding the legal title to one half interest in a judgment in trust for others, coupled with a power to control and collect it and divide the proceeds among those interested therein, impliedly possess power to employ attorneys and use all the usual and ordinary means to carry out the purposes of the trust, and to charge the expenses thereof against the fund recovered. *Vilas v. Bundy,* 168

4. An attorney, at his own expense and risk, may employ an assistant to aid him in his professional work for a client, and charge such client with the reasonable value of the entire labor; and that does not militate against the rule that the relation of attorney and client does not imply authority to the former to employ another attorney at the client's expense. *Ibid.*

5. If one of two joint plaintiffs employ two attorneys to act jointly in his behalf in the prosecution of a cause, and the other employ one of such attorneys to act for him, an agreement between the attorneys to put their earnings into a common fund for equal distribution does not militate against the right of either to charge and collect of his client the full reasonable compensation for the professional labor undertaken by him for such client and performed personally and by the aid of his assistant and subordinate. *Ibid.*

6. The relation of attorney and client, where the attorney has general authority over the subject of his employment, implies authority to such attorney to incur such expenses in the professional undertaking as are usual and reasonably necessary, under all the circumstances, to carry out the object of the employment. *Ibid.*

7. Wilful misstatements of the law by attorney to client to secure an advantage to himself, with knowledge of the falsity and intent to defraud on the one side and ignorance and reliance on the other, constitute actionable fraud. *Allen v. Frawley,* 638

8. The statute of limitations does not commence to run upon an attorney's claim for services until the termination of the proceeding in which they were rendered, where his employment was to conduct such proceeding to its termination, or until the employment is otherwise terminated. Thus, evidence tending to show that an attorney was employed to collect certain notes by suit; that the action was tried several times but no result reached; that a reference as to one branch of the case was agreed on; that the case lay dormant for more than six years in this condition, when a trial was had before the referee, conducted by said attorney; and that thereafter he was advised by the client to take no further steps,—is *held* sufficient to justify a finding by a jury that the employment was entire

and did not terminate until after the trial before the referee. *Lowe v. Ring*, 647

2. So, evidence tending to show that in 1881 or 1882 a bank placed a note in an attorney's hands for collection; that he procured from the maker an assignment of a life insurance policy as collateral; that in order to perfect the collateral he brought an action to compel the issuance of a paid-up policy, which was settled by its issuance; and that he retained the policy and the note as an uncompleted collection until 1897, when he surrendered it to the president of the bank upon the assurance that he would be paid for his services,—is *held* sufficient to sustain a finding that there had been no termination of the employment, at least until the surrender of the policy. *Ibid.*

BAILMENTS.

1. The issue being whether a horse was foundered while in the possession of defendant as bailee, it was prejudicial error to permit the defendant to testify, against objection, that a person experienced in handling horses, who examined the horse while in defendant's possession, told him that the founder was an old one and to drive the horse home. *Hildebrand v. Carroll*, 324

2. When a bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, proof that it was returned in a damaged condition, and that the injury was such as does not ordinarily occur without negligence, establishes a *prima facie* case of negligence against the bailee, and puts upon him the burden of showing to the contrary. *Ibid.*

BANKRUPTCY. See VOLUNTARY ASSIGNMENT.

BANKS AND BANKING.

See CORPORATIONS, 7, 16-27. CRIMINAL LAW, 19.

1. An insolvent bank was reorganized, certain of the stockholders executing and delivering to it an agreement to give to it their several notes to the amount of their respective holdings of stock, "to be used and collected only in case there is a shortage in present assets and cash to cover liabilities to creditors and for stock." Such agreement further provided that any payment on a note so given should amount to a discharge *pro tanto* of the payor's statutory liability as a stockholder. The bank resumed business and continued until it again became insolvent. *Held*, that the agreement did not, as regards creditors, take the place of the statutory liability of the stockholders, and that an action to enforce the agreement according to its terms was properly brought by the receiver of the bank. *Thompson v. Gross*, 34

2. The fact that the creditors of the bank were not parties to the agreement did not render it invalid on the ground of a failure of the consideration that payment should discharge statutory liability. *Ibid.*

3. Payments made under the agreement would constitute a trust fund to be so administered that the statutory liability of those signing the agreement would *pro tanto* be discharged; and the creditor beneficiaries could not participate in such fund except by releasing, *pro tanto*, their rights against the stockholders under the statute. *Ibid.*

4. The reorganization of the insolvent bank, which was in the hands of a receiver, and its resumption of business on a plan which discharged, at the outset, a large part of the claims that were enforceable against the stockholders under the statute and released the bank assets from the trust for creditors and returned them to the control of the corporation, and the mutual promises of the stockholders who executed the agreement above mentioned in order to effect such result, constituted a sufficient consideration moving to said stockholders to support the agreement. *Ibid.*

5. In an action against the stockholders who executed said agreement, for an accounting and to enforce the agreement, an allegation of the complaint that there is a deficiency of assets of the bank existing at the date of the agreement to discharge the liabilities therein mentioned, and that an accounting is necessary to determine the exact amount, sufficiently shows that the contingency mentioned in the agreement has happened, so that the action cannot be held, on demurrer, to have been prematurely brought. *Ibid.*

6. If the officers of a banking corporation misrepresent its condition, whereby a person is led to deposit his money therein and lose it, by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, only upon the ground of deceit. *Killen v. Barnes*, 546

7. There is no trust or fiduciary relation between the creditors of a banking corporation and such corporation or its officers. Such relation exists between such officers and the bank, but that between the bank and its creditors is merely the relation of debtor and creditor. *Ibid.*

8. The trust-fund doctrine, so called, under which it is held in some jurisdictions that officers of a bank are liable directly to its depositors as *quasi* trustees, does not prevail in this state. *Ibid.*

9. Officers of a bank are liable to it for official misconduct resulting in loss or waste of its property, and, as a fiduciary relation exists between such officers and the corporation, such liability survives and is assignable; and the result of that doctrine is that all such liabilities pass to an assignee for the benefit of creditors by a general assignment of its property for that purpose. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 10, 11.

BILLS AND NOTES.

See CORPORATIONS, 4, 5.

In an action upon a note which plaintiffs, for a sufficient consideration, had bought with other assets of the payee, a corporation, at a receiver's sale which had been confirmed by the court, it is no defense that plaintiffs had made such purchase intending to hold merely a nominal title to said assets and to allow a stockholder of the corporation to reap the benefit therefrom, in fraud of the other stockholders and creditors of the corporation. *Anderson v. Johnson*, 218

BONA FIDES. See ADVERSE POSSESSION, 1, 3.

BOND on appeal. See APPEAL, 25.

BURDEN OF PROOF. See APPEAL, 12. BAILMENTS, 2. SALE OF CHATTELS, 10.

CARRIERS.

See STREET RAILWAYS, 3–5.

A railway company received goods consigned to plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road, in care of a certain steamship company at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience defendant transferred the goods at Duluth to a railway company to be carried to West Superior. and while in possession of such railway company the goods were damaged. *Held:*

(1) Except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the duties and responsibilities of an intermediate and forwarding carrier are irrelevant.

(2) The delivery to another carrier at Duluth was a breach of defendant's contract and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty. *S. D. Seavey Co. v. Union T. Co.* 394

CASES DISTINGUISHED, ETC.

1. *Ablard v. Fitzgerald*, 87 Wis. 516; *Elofrson v. Lindsay*, 90 Wis. 203; *Fuller v. Worth*, 91 Wis. 406 (as to adverse possession: tacking), remarks overruled. *Illinois Steel Co. v. Budzisz*, 512
2. *Bigelow v. Danielson*, 102 Wis. 470. See No. 14.
3. *Briggs v. Hiles*, 87 Wis. 447 (as to findings by referee), a remark overruled. *Johnson v. Goult*, 247, 251
4. *Dikeman v. Struck*, 76 Wis. 332 (as to general appearance after default), overruled in part. *Zimmerman v. Gerdes*, 608, 611
5. *Draper v. Baker*, 61 Wis. 450 (as to evidence of reputed wealth), followed. *Eggett v. Allen*, 633, 635
6. *Elofrson v. Lindsay*, 90 Wis. 203. See No. 1.
7. *Fuller v. Worth*, 91 Wis. 406. See No. 1.
8. *Harrison v. Milwaukee*, 49 Wis. 247; *Watkins v. Milwaukee*, 52 Wis. 98; *Liebermann v. Milwaukee*, 89 Wis. 336 (as to remedies), followed. *Kersten v. Milwaukee*, 200, 206
9. *Holton v. Burton*, 78 Wis. 326; *Second Ward S. Bank v. Schranck*, 97 Wis. 258 (as to insolvent law), remarks limited. *Binder v. McDonald*, 333, 340
10. *Huston v. Fort Atkinson*, 56 Wis. 350 (as to streets), distinguished. *Krueger v. Wis. Tel. Co.* 97, 107
11. *J. I. Case P. Works v. Niles & S. Co.* 90 Wis. 590 (as to implied warranty), remarks limited. *J. Thompson Mfg. Co. v. Gunderson*, 450, 457
12. *Kingman & Co. v. Watson*, 97 Wis. 596; *Nichols & S. Co. v. Chase*, 103 Wis. 570 (as to notice and waiver of defects), distinguished. *Parry Mfg. Co. v. Tobin*, 288, 289
13. *Kingsley v. G. N. R. Co.* 91 Wis. 380 (as to appealable orders), distinguished. *Welsher v. Libby, McNeil & Libby*, 292

14. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Bigelow v. Danielson*, 102 Wis. 470 (as to special verdict), distinguished. *Hildman v. Phillips*, 618

15. *Liebermann v. Milwaukee*, 89 Wis. 336. See No. 8.

16. *Losie v. Underwood L. Co.* 79 Wis. 631; *Minton v. Same*, id. 646 (as to lien on logs), distinguished. *Blonde v. Menominee B. S. L. Co.* 5[illegible]2

17. *McClure v. Sparta*, 84 Wis. 269 (as to hatchway in sidewalk), criticised. *Whitty v. Oshkosh*, 90

18. *McGowan v. Supreme Court*, 104 Wis. 173 (as to change of beneficiary), distinguished. *Alvord v. Luckenbach*, 538

19. *Minton v. Underwood L. Co.* 79 Wis. 646. See No. 16.

20. *Morgan v. Bishop*, 61 Wis. 407; *Smith v. Dragert*, 65 Wis. 507 (as to amendment of pleading: terms), distinguished. *Illinois Steel Co. v. Budzisz*, 504

21. *Nichols & S. Co. v. Chase*, 103 Wis. 570. See No. 12.

22. *Noble v. Strachan*, 32 Wis. 314 (as to leave to discontinue), a remark criticised. *State ex rel. Milwaukee v. Ludwig*, 233

23. *North Hudson B. & L. Asso. v. Childs*, 82 Wis. 460 (as to care due from corporate officers), affirmed. *Killen v. Barnes*, 547, 574–5

24. *Parish v. Eden*, 62 Wis. 272; *Reed v. Madison*, 83 Wis. 171 (as to notice of injury), overruled in part. *McKeague v. Green Bay*, 577, 580–582

25. *Pettigrew v. Evansville*, 25 Wis. 223 (as to waters), distinguished. *Clauson v. C. & N. W. R. Co.* 318

26. *Reed v. Madison*, 83 Wis. 171. See No. 24.

27. *Ryan v. C. & N. W. R. Co.* 101 Wis. 506. See No. 35.

28. *Second Ward S. Bank v. Schranck*, 97 Wis. 258. See No. 9.

29. *Sheboygan Co. v. Sheboygan*, 54 Wis. 415 (as to special assessments), distinguished. *State ex rel. Donnelly v. Hobe*, 420

30. *Smith v. Dragert*, 65 Wis. 507. See No. 20.

31. *State v. Wentler*, 76 Wis. 89 (as to uncertainty in statute), distinguished. *State v. Seiler* 346, 349

32. *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436 (as to injunction *pendente lite*), distinguished. *Ward v. Sweeney*, 44, 50

33. *Ward v. Jefferson*, 24 Wis. 342 (as to defective street), explained. *Peake v. Superior*, 409

34. *Watkins v. Milwaukee*, 52 Wis. 98. See No. 8.

35. *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226; *Ryan v. C. & N. W. R. Co.* id. 506 (as to condition precedent), overruled. *Meisenheimer v. Kellogg*, 30, 33

CERTIORARI. See JUSTICES' COURTS.

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES. See FRAUDULENT CONVEYANCES, 1.

CHURCH CORPORATIONS. See RELIGIOUS SOCIETIES.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS. See COUNTIES. ESTATES OF DECEDENTS, 3, 4. JUDGMENT, 8. MUNICIPAL CORPORATIONS, 26.

CLERICAL MISTAKES. See JUDGMENT, 3–6.

CLOUD UPON TITLE. See JUDGMENT, 7. TAX TITLES, 2–4.

CO-EMPLOYEES. See MASTER AND SERVANT, 6. RAILROADS, 3.

COMBINATIONS in restraint of trade. See MONOPOLIES.

COMITY.

See CORPORATIONS, 16.

1. Although an action to enforce a liability created by statute in one state is transitory, no exclusive remedy having been provided, yet the enforcement of such liability in another state is dependent on the rule of comity. *Finney v. Guy,* 256

2. The rule of interstate comity does not require the courts of one state to enforce rights dependent upon the laws of another state if such laws contravene the policy of the state whose jurisdiction is invoked or subject its citizens to serious inconvenience or injustice. *Ibid.*

COMMERCIAL PAPER. See BILLS AND NOTES. CORPORATIONS, 4, 5.

COMMON CARRIERS. See CARRIERS. STREET RAILWAYS, 3–5.

COMMON SCHOOLS. See SCHOOLS.

CONDITIONS precedent. See JUDGMENT, 6. LIMITATION OF ACTIONS, 2, 3. SALE OF CHATTELS, 11. TAX TITLES, 3, 4.

CONFIDENTIAL RELATIONS. See BANKS AND BANKING, 7. DEEDS.

CONFLICT OF LAWS. See CORPORATIONS, 16–22. VOLUNTARY ASSIGNMENT.

CONSIDERATION. See BANKS AND BANKING, 2, 4.

CONSPIRACY.

See ACTION, 4–8. CORPORATIONS, 2. FRAUD. LIMITATION OF ACTIONS, 1. MONOPOLIES.

In an action upon a note purchased by plaintiffs at a receiver's sale of the assets of a corporation, a counterclaim alleging that plaintiffs had conspired with a stockholder in the corporation to procure the title of the corporate assets in the name of the plaintiffs, but for the real benefit of said stockholder, and alleging, also, a malicious abuse of process by said stockholder against the defendants, but failing to connect plaintiffs therewith by any averment that they had conspired with said stockholder to injure defendants by the malicious use of process, is *held* not to state a cause of action against the plaintiffs. *Anderson v. Johnson,* 218

CONSTITUTIONAL LAW.

See APPEAL, 4, 5. CORPORATIONS, 16–22. CRIMINAL LAW, 15. JUDGMENT, 8.

1. In order that a statute authorizing constructive service of summons upon a corporation should be valid, the method provided should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity to be heard and to make a defense. *Pinney v. Providence L. & I. Co.* 396

2. The provision of sec. 1775*b*, Stats. 1898, that until a domestic private corporation has filed with the register of deeds of the county where its principal office is located a list of its officers upon whom service of process, etc., may be made, such service may be made by leaving a copy of the process, etc., with the register of deeds, is void, being in violation of sec. 1, art. XIV, Amendm. Const of U. S. (which declares that no state shall deprive any person of life, liberty, or property without due process of law). *Ibid.*

CONTRACTS.

See ACTION, 6, 8. ADVERSE POSSESSION, 4. ATTORNEYS, 3–6. BAILMENTS. BANKS AND BANKING, 1–5. BILLS AND NOTES. CARRIERS. CORPORATIONS, 4–12. COURT AND JURY, 1. DAMAGES, 5. DEEDS. FRAUD. FRAUDULENT CONVEYANCES. INSURANCE. LANDLORD AND TENANT. LOGS AND LOGGING. MUNICIPAL CORPORATIONS, 1, 2. PARTNERSHIP. SALE OF CHATTELS. SCHOOLS, 1.

A contract by which an importer agreed to sell to a dealer certain brands of beer so long as the dealer should thereafter continue to buy said beers from him, but which did not bind the dealer to buy any of such beer, is not binding upon the importer, for want of mutuality. *Teipel v. Meyer*, 41

CONTRIBUTION for losses. See PARTNERSHIP, 2.

CONTRIBUTORY NEGLIGENCE. See MUNICIPAL CORPORATIONS, 15, 21. PLEADING, 1. RAILROADS, 1, 2. STREET RAILWAYS, 1, 2.

CONVEYANCES. See ADVERSE POSSESSION, 1, 2. DEEDS. EQUITY. FRAUD. FRAUDULENT CONVEYANCES. RELIGIOUS SOCIETIES, 3, 4.

CORPORATIONS.

See MUNICIPAL CORPORATIONS. RELIGIOUS SOCIETIES.

Promoters: Fraud in sale of land.

1. In order to entitle a corporation which has received property from promoters at a higher price than it cost them, or at a price above the fair market value, to rescind or to recover back the profits made by the promoters, the promoters must have deceived or misled some of their associates, either by affirmative words or acts, or by silence under such circumstances that they might reasonably apprehend that such associates might act upon a wrong assumption or understanding. *Spaulding v. North Milwaukee T. S. Co.* 481

2. The owners of undivided interests in two tracts of land which they had purchased for $900 and $1,000 per acre respectively, agreed among themselves to form a corporation and convey the land to it at $1,500 per acre in exchange for stock. The owners of one interest sold part of it to third persons, without the knowledge or approval of their co-owners, at prices ranging from $1,200 to $1,500 per acre, upon the understanding that the interests purchased were to be turned over to the corporation under the agreement mentioned. When the agreement was about to be executed such purchasers appeared ready and willing to convey their interests to the corporation according to its terms, and it was thereupon carried out. One of said purchasers subsequently claimed that he had been induced to purchase at $1,325 per acre by the representation that the land cost $1,300. *Held*, that the fraud, if any, was personal to the complaining purchaser, and was perpetrated by his vendors alone and not in conspiracy with the other owners, and that a recovery therefor could not be had in an action to enforce corporate rights. *Ibid.*

3. After the organization of the corporation in such case a third person purchased shares of stock, the representation being made as an inducement that the land "had been syndicated at a cost to the corporation of $1,500 per acre." *Held* that, even if the representation were false, no cause of action in favor of the corporation arose by reason thereof. *Ibid.*

Officers: Powers, duties, and liabilities. See BANKS AND BANKING, 6-9.

4. A provision in articles of incorporation making it the duty of the president "to have general charge, control, and management of the affairs of the corporation, and also to sign all contracts and conveyances," confers express authority upon that officer to indorse commercial paper, which all dealing with the corporation are entitled to rely upon implicitly. *Hiawatha I. Co. v. John Strange P. Co.* 111

5. The president of a corporation, who had both apparent and express authority to indorse commercial paper in its name, executed his individual notes payable in form to the corporation, and then as president indorsed them in blank in the corporate name and delivered them in payment of his individual debt to a third person. Such indorsement was not authorized by the directors, and the corporation received no consideration therefor. Before maturity the notes were transferred, for an adequate consideration, without further indorsement, to another corporation having no actual knowledge of their infirmity, by a business man in good repute, who had possession and apparent ownership of them. *Held*, that said transferee was a *bona fide* purchaser, and not charged with notice of the fraud upon the indorser by the circumstances under which the notes were purchased or by anything appearing upon their face. *Ibid.*

6. Where services are rendered to a corporation by one of its officers, which are clearly outside of his official duties, a recovery may be had therefor under implied contract, if the circumstances be such as to fairly imply that it was expected that the services were to be paid for; and in considering whether such implied contract was proven, or whether the services were rendered gratuitously, the nature of the corporation and its business, the extent and character of the services, the comparative amount and value of the services of other officers, the extent of the officer's interest in the corporation, as well as all the other surrounding circumstances, are to be considered. *Lowe v. Ring,* 647

7. Where a bank is creditor of the estate of a decedent, and vitally interested in a wise administration thereof, it may contract, either expressly or by implication, to pay one of its officers for his services as administrator of the estate. *Ibid.*

8. Although it is not forbidden for directors of a corporation to sell their property to it, they owe it the duty not merely of full disclosure of all material facts, but diligent and faithful endeavor to promote its interests. *Spaulding v. North Milwaukee T. S. Co.* 481

9. Two of the seven directors of a corporation, in whose name the title to a tract of land containing 8.09 acres stood, offered it to the corporation at $1,100 per acre, representing that such price was an advance of $100 per acre or ten per cent. over the price paid, and the offer was unanimously accepted. The value of the land exceeded the price paid, but it was not explained that the land had been purchased as six and one-half acres for $6,540, nor was it disclosed that two other directors, who were active real-estate men and better versed in values than the remaining three directors, were also interested in the land. *Held*, that the corporation might recover back not only the undisclosed profits but also the ten per cent. profit which was not concealed. *Ibid.*

10. In an action in the name of certain stockholders to enforce the right of the corporation to recover back such profits, it appeared that

the corporation had been dissolved; that the holders of nearly nine tenths of the stock had joined in the liquidation of the corporation and division of its assets, and had surrendered their stock and released any claim or right to be reimbursed for their share of the moneys obtained by defendants from the corporation; that plaintiffs were indebted to the corporation for assessments on their stock; and that the other holders of the stock which had not been surrendered were not before the court. *Held*, that the recovery should be in the name of the corporation, as trustee for the plaintiffs and the other holders of unsurrendered stock, to be paid over to them or credited upon their indebtedness to the corporation. *Ibid.*

11. The appointment of a receiver for the corporation in such case was not necessary. *Ibid.*

12. All the directors of a corporation who participated in obtaining money from it in derogation of their duties are liable jointly and severally for the entire amount out of which the corporation was defrauded, and not each director individually for the share realized by him. *Ibid.*

13. The joint and several liability of the directors of a corporation for all of its indebtedness under sec. 1765, Stats. 1898, resulting from a violation of its provisions respecting the payment of dividends, is penal in character. A right to the benefits of it does not survive at the common law or by any statute of this state, and is not assignable. *Killen v. Barnes*, 546

14. The rule stated in *North Hudson B. & L. Asso. v. Childs*, 82 Wis. 460, respecting the degree of care the officers of a corporation owe to their principal, affirmed under the doctrine of *stare decisis*. *Ibid.*

15. A creditor of a corporation, under secs. 3237, 3239, Stats. 1898, if, looking to the interests of its creditors, the ends of justice require or the court direct, may maintain an action in equity to redress wrongs to such corporation growing out of the misconduct of its officers, resulting in loss or waste of the corporate assets. *Ibid.*

Stockholders' liability to creditors: Enforcement: Interstate comity. See BANKS AND BANKING, 1-5.

16. The statutory liability of stockholders of a bank to its creditors is of precisely the same nature under the laws of Minnesota as under the laws of this state, and the statutes of that state (Gen. Stats. Minn. secs. 5905, 5906) providing a remedy for its enforcement are similar to ours (Stats. 1898, secs. 3223, 3224). As construed by our courts and by the earlier decisions in Minnesota, the remedy so provided is exclusive and requires a single equitable action to be brought in the home jurisdiction in behalf of all the creditors and against all the stockholders within that jurisdiction, and that all the rights, equities, and liabilities of the parties shall be finally settled and determined therein; but in a later case the supreme court of Minnesota has decided that the statutory remedy does not preclude ancillary actions, either in the home or other jurisdictions, to reach stockholders who could not be reached in the first instance, and, upon the theory that they are represented in the original action by the corporation, that such stockholders are bound in the ancillary action by the determination in the original action of all questions necessarily there litigated. *Held*, that such decision is so out of harmony with the previously established doctrine in that state and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality

of remedies, and of the right of every person to his day in court as to every material question involving his interest, as well as so contrary to the policy of the law of this state, that effect should not be given to its doctrine by the courts of this state, under the rule of comity, as against a Wisconsin stockholder in a Minnesota bank whose liability as such accrued prior to said decision. *Finney v. Guy*, 256

17. In an action to enforce the statutory liability of the stockholders of a corporation to its creditors the corporation itself is not a necessary party unless there are corporate assets to be reached. If made a party, it does not in any sense represent absent stockholders so as to make the judgment binding upon them. *Ibid.*

18. The constitutional or statutory liability of stockholders of a corporation to its creditors, created by the laws of the state of Minnesota, must be held to be of the same nature here as by the highest court of such state. *Eau Claire Nat. Bank v. Benson*, 624

19. It having been determined by the supreme court of Minnesota, that the constitutional liability of stockholders of a Minnesota banking corporation is of such a nature that it cannot be enforced by an action at law by one or any number of creditors against one or any number of stockholders, this court is bound thereby. *Ibid.*

20. The term "self-executing," as applied to a constitutional or statutory provision in regard to an added liability of stockholders of a corporation to its creditors, has reference only to whether such a provision is enforceable without any specific remedy therefor given by the written law. *Ibid.*

21. If a constitutional or statutory provision, regarding an added liability of stockholders of a corporation to its creditors, be self-executing, yet its nature be such that it cannot be enforced otherwise than by an action in equity in favor of all the creditors against all the stockholders, brought in the home jurisdiction where the corporation can be reached, it cannot be otherwise enforced either in the home or any other jurisdiction. *Ibid.*

22. Judicial authorities in a state, regarding the added liability of stockholders under its laws, to the effect that it is enforceable at law by a single creditor against a single stockholder as an ordinary debt of the latter to the former, and authorities to the effect that such liability can be enforced in any jurisdiction where service can be obtained upon any stockholder, have no application whatever to a liability of a stockholder construed by the highest tribunal of the state where it was created as one not enforceable except by an action in equity in favor of all the creditors of the corporation desiring to participate therein, against all the stockholders within the jurisdiction of the court. *Ibid.*

23. If the stockholders of an insolvent bank that has made an assignment for the benefit of its creditors, voluntarily pay into the trust fund thus created the full amount of their double liability created by law, and such additions to such fund be distributed to and received by the creditors according to their right to participate in the benefits of such liability, it is thereby discharged. *Killen v. Barnes*, 546

24. Liabilities for unpaid subscriptions to the capital stock of a corporation pass to an assignee under a general assignment of its property for the benefit of its creditors, and they cannot participate therein in any other way than by becoming parties to such assignment. *Ibid.*

25. An assignment by an insolvent corporation, for the benefit of its creditors, does not constitute an action for the enforcement of liabilities of its stockholders for unpaid subscriptions to its capital stock. *Ibid.*

26. Sec. 1755, Stats. 1898, relating to the liability of stockholders of a corporation to its creditors, can be invoked only by creditors existing at the time of the commission of the act upon which the liability depends, and to the extent the capital stock is diminished by such violation. *Ibid.*

27. Where the interests of all creditors who desire to invoke equity jurisdiction to enforce liabilities of officers and stockholders of a corporation are trifling in amount, or there is no good reason appearing why such interests cannot be adequately protected otherwise than by means of the exercise of such jurisdiction, the court may properly deny any right thereto. *Ibid.*

Insolvency: Fraudulent conveyances: Voluntary assignment. See BILLS AND NOTES. FRAUDULENT CONVEYANCES. VOLUNTARY ASSIGNMENT, 4.

Receivers. See CORPORATIONS, 11.

Service of process. See APPEAL, 1. CONSTITUTIONAL LAW.

Foreign corporations. See APPEAL, 1. CORPORATIONS, 16–22.

CORROBORATION. See CRIMINAL LAW, 18.

CORRUPT PRACTICES. See ELECTIONS, 3.

COSTS. See APPEAL, 2. PLEADING, 2, 3.

COUNTERCLAIM. See MUNICIPAL CORPORATIONS, 11.

COUNTIES.

See TAXATION.

1. On an appeal from a county board's disallowance of a claim the county cannot be forced to accept and treat as the original statement of the claim what purports to be a copy thereof and is so designated in the notice of appeal, without proof of loss or destruction of the original and that the alleged copy is a true copy. *Miller v. Crawford Co.* 210

2. An account for services as local fish and game warden, containing numerous items consisting merely of dates and the names of places, without description of the nature of the services charged for, is not such a statement of the claim as is required by sec. 677, Stats. 1898. *Ibid.*

3. Sec. 677, Stats. 1898, providing for the making and filing of written statements as therein prescribed of claims against counties, and that "no such claim . . . shall be acted upon or considered by any county board unless such statement shall have been so made and filed," is mandatory and must be substantially complied with. *Ibid.*

4. If the statement of a claim against a county as filed is not in substantial compliance with said sec. 677, it is insufficient as a complaint in the circuit court upon an appeal from the disallowance of the claim. *Ibid.*

5. Although the record of the proceedings of the county board states that a claim was "disallowed" for the reason that it was not properly itemized, yet, it being obvious that the board did not pass upon the merits of the claim but merely suspended action until it should

be properly itemized, there was no disallowance from which an appeal could be taken. *Ibid.*

6. Whether, where no fund has been set apart by the county board for the purpose of enforcing the fish and game law, from which, under sec. 1498*d*, Stats. 1898, deputy wardens might be paid, the state fish and game warden had power, by appointing deputy wardens pursuant to sec. 1498*b*, to force an indebtedness or liability against the county, is doubted but not decided. *Ibid.*

7. In an action against a county to recover the amount of a claim which had been presented to the county board but, it was alleged, had neither been allowed nor disallowed, the original bill filed with the county board was not, by itself, evidence of any fact tending to support the cause of action. *Jones v. Washburn Co.* 391

8. A bill against a county, consisting of several items amounting to $277.60, was presented to the county board and referred to the proper committee, who recommended that it be allowed at $25.10. The report was adopted and an order for the amount allowed drawn and paid. Instead of designating each particular item allowed and disallowed as required by sec. 678, Stats. 1898, the last three items, amounting to the sum allowed, were marked with a bracket, and that amount written opposite it. *Held*, that there was a complete disallowance of the bill except as to the three items mentioned. *Ibid.*

COUNTY TREASURER. See MUNICIPAL CORPORATIONS, 13 (5, 6). TAXATION, 2–4.

COURT AND JURY.

See CRIMINAL LAW, 11. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 1. MUNICIPAL CORPORATIONS, 15, 22. RAILROADS, 2. SALE OF CHATTELS, 1. VERDICT.

1. Where there is no ambiguity in the language of a contract as applied to the undisputed facts, it is the province of the court to interpret it; but where the subject matter of such contract and the circumstances under which it was made may properly be considered in order to correctly determine the meaning the parties gave to its language, and conflicting inferences may reasonably be drawn from such evidence in regard to such meaning, the proper inference should be determined by a jury, and that is true whether the ambiguity springs from uncertainty in the literal sense of the words themselves or from the application of plain words to the facts. *Vilas v. Bundy,* 168

2. The jury should not be required to determine a fact as to which there is no evidence whatever, except as an inference in respect thereto might be drawn, after the determination of the real issue, from the facts then found. *Conrad v. Kelley,* 252

COURTS. See COMITY. CORPORATIONS, 16–22. MANDAMUS.

CREDITORS' REMEDIES. See CORPORATIONS, 13, 15–27. FRAUDULENT CONVEYANCES. LIENS. VOLUNTARY ASSIGNMENT.

CRIMINAL LAW AND PRACTICE.

1. In a prosecution for murder, uncontradicted evidence that during a quarrel between the deceased and the defendant the latter was pushed downstairs, and that he immediately went around the house, procured an ax, returned with it to the second story, and

struck the deceased, inflicting a mortal wound, is *held* to show ample time and opportunity for the formation of the premeditated design to kill which is necessary to murder in the first degree. *Miller v. State,* 156

2. A witness whom it is sought to impeach by showing a statement made out of court contradictory to his evidence must first be asked whether he did not make the statement, fixing with reasonable certainty time, place, and person to whom it is claimed to have been made; and if he does not admit it testimony may afterwards be introduced showing that such statement was made. *Ibid.*

3. Where a witness to a homicide had authorized her father to make a statement of the facts for publication, the newspaper article as published was inadmissible as foundation for impeachment, but she should have been asked directly as to her statements made to her father. *Ibid.*

4. In a prosecution for murder the wife of the accused is not a competent witness. *Ibid.*

5. After giving testimony as to the possibility or probability of temporary irresponsibility on the part of the defendant at the time of the homicide, a medical witness, on being asked whether insanity which suddenly takes place in a man and enables him to inflict a blow sufficient to produce death, and then suddenly disappears, was not known as "convenient insanity," replied that he had never heard that term. *Held,* that, although the question was objectionable, yet, in view of the answer, the error in permitting it to be answered was not prejudicial to the defendant. *Ibid.*

6. The refusal of an instruction to the effect that if a witness had intentionally misstated or concealed certain facts the jury were at liberty to disregard *all* her testimony, was not error, such instruction being incorrect without the qualifying clause "unless such testimony was corroborated by other credible evidence." *Ibid.*

7. Where a charge to the effect that if the jury found that a witness for the prosecution had been successfully impeached they might disregard her testimony, did not require the jury to find that she had intentionally falsified and did not add the qualifying clause above mentioned, such errors were not prejudicial to defendant. *Ibid.*

8. A request by the district attorney that the court instruct the jury, on the subject of reasonable doubt, "that it is not every fanciful or shadowy doubt that a man could conjure up in his mind, but only such reasonable doubt as a reasonable man would have," cannot be successfully assigned as error, it being a request which he had the right to make, and, so far as it went, a correct statement of the law. *Ibid.*

9. A failure to define reasonable doubt in the charge is not error where no specific instruction on the subject was asked on behalf of the plaintiff in error. *Ibid.*

10. Abusive remarks of the district attorney in his argument to the jury, as to the vicious personal appearance of the defendant, are criticised as likely to call for reversal in a close case, but *held* not prejudicial in this case, in view of the clear evidence of guilt and the absence of any showing that the attention of the trial court was called to them. *Ibid.*

11. Although the ax with which a homicide was committed by striking the deceased on the head should have been held, as matter of law, to have been a dangerous weapon within the meaning of sec. 4354,

Stats. 1898, defining manslaughter in the third degree, yet to leave that question to the jury was not an error prejudicial to the defendant, where the jury found him guilty of murder in the first degree under instructions to consider and determine the question of premeditated design first, and to consider the question of manslaughter in the third degree only in case they found no such design. *Ibid.*

12. In a prosecution for an assault and battery alleged to have been committed by a "magnetic healer" upon a female patient, to whom he was giving massage treatment, by fraudulently inducing her to expose her person to him for his lewd personal gratification, the testimony of physicians that they were familiar with the massage treatment, the methods employed in giving it, and the reasonable requirements on the part of the patient in order to receive it, is *held* sufficiently to show that they possessed special knowledge qualifying them to testify, as experts, as to the necessity of the exposure of the person of the patient and the custom in that regard where the patient was a woman and the operator a man. *Bartell v. State,* 342

13. The exclusion of evidence in such case that the defendant had cured a person by his method of treatment was not harmful, where the jury were distinctly instructed that the only question for them to decide was whether defendant was acting in good faith on the occasion in question, or whether he needlessly caused the patient to submit her body to him for the gratification of his evil desires. *Ibid.*

14. District attorneys being expressly exempted by subd. 2, sec. 752, Stats. 1898, from the duty of prosecuting persons charged with assault and battery, it was not error to allow an attorney privately employed to conduct the case for the prosecution, after the district attorney had taken part in it in his official capacity. *Ibid.*

15. Sec. 4580, Stats. 1898, as amended by ch. 99, Laws of 1899 (providing, first, that if any man commits fornication with a sane female over the age of fourteen each shall be punished by imprisonment in the county jail, etc.; and, second, that if any man commits fornication with a sane female of previous chaste character under the age of eighteen years, he shall be punished by imprisonment in the state prison, etc.), is a valid enactment so far as it provides a punishment for the latter offense; and the fact that it leaves some discretion in the prosecuting officer in some cases whether to prosecute under one clause or the other does not affect its validity. *State v. Wentler,* 76 Wis. 89, distinguished. *State v. Seiler,* 346

16. The word "man," as used in said statutes, is not limited to male persons over twenty-one years of age, but includes male persons who have arrived at the age of puberty, or are capable of committing fornication. *Ibid.*

17. An information contained two counts,— the first charging rape and the second fornication with a sane female of previous chaste character under eighteen years of age. The prosecutrix was between fifteen and sixteen years of age, and testified to an atrocious attack upon her. Her testimony that she was of previous chaste character was uncorroborated. The defendant admitted the intercourse, but claimed that it was with her consent. At the close of the testimony the district attorney withdrew the charge of rape, and the jury found the defendant guilty on the second count. *Held,* that, although this finding negatived the use of force and thus tended to discredit the testimony of the prosecutrix, yet her testimony as

to previous chaste character was still in the case and might support the verdict. *Ibid.*

18. In a prosecution for fornication with a sane female of previous chaste character under the age of eighteen years, corroboration of her testimony as to chastity is not required in order to sustain a conviction. *Ibid.*

19. One who receives from a bank, upon a check, more money than he is entitled to, and with knowledge of the facts refuses to pay it back upon demand, is guilty of larceny. *Bergeron v. Peyton,* 377

DAMAGES.

See ANIMALS, 2. CARRIERS. FALSE IMPRISONMENT, 2–5. LANDLORD AND TENANT. MALICIOUS PROSECUTION, 1. SALE OF CHATTELS, 5, 10. STREET RAILWAYS, 3–5.

1. Damages in a tort action are not divided into actual, compensatory, and exemplary. Actual damages and compensatory damages are synonymous terms, each covering all loss recoverable as a matter of right. *Gatzow v. Buening,* 1

2. Where recoverable damages include injury to the feelings, compensation therefor is a matter of right, and not, like punitive damages, in the discretion of the jury. *Ibid.*

3. There being no physical injury, recovery cannot be had for injury to feelings, where plaintiff hired, for the funeral of his child, a carriage and hearse of a member of a liverymen's association, and such member and the secretary of the association ordered them away just as they were about to be used, because of rules of the association that members should not furnish vehicles where the undertaker in charge patronized nonunion liverymen. *Ibid.*

4. A man forty-four years of age, capable of earning $30 per month at ordinary labor and $75 per month at his trade, was by an injury permanently incapacitated from working at his trade and, in a considerable degree, from working at manual labor at all. The bones on one side of his face were fractured, and the sensory nerve materially and permanently injured, and his brain affected to some degree, permanently. *Held,* that an award of $3,500 as damages was not excessive. *Nicoud v. Wagner,* 67

5. Damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties, at the time of the making of such contract, as the probable result of a breach of it. *Serfling v. Andrews,* 78

DEBTOR AND CREDITOR. See BANKS AND BANKING. CORPORATIONS, 13, 15–27. FRAUDULENT CONVEYANCES. LIENS. VOLUNTARY ASSIGNMENT.

DECEIT. See ACTION, 1, 2. BANKS AND BANKING, 6. CORPORATIONS, 2, 3.

DEEDS.

See ADVERSE POSSESSION, 1, 2. EQUITY, 1, 2. RELIGIOUS SOCIETIES, 3, 4.

1. A woman eighty-eight years old conveyed land worth $1,400 to her son in consideration of his agreement to pay her $50 per year during her life and to pay the incumbrances on the land, being the sum of $200 due to the state on the original purchase price, and a mortgage for $700. These sums were past due and were bearing

interest, and the grantor was unable to pay them. Had payment been enforced it is doubtful if the property would more than have paid principal, interest, and costs. *Held*, that the transaction was not so unjust or unreasonable, as a business proposition, as to indicate on its face that the son had taken advantage of his mother to secure an unjust benefit to himself. *Marking v. Marking*, 292

2. The mother in such case had a good memory and understood what she was doing, and the son did not attempt to deceive her, but she followed his suggestions because she relied on his judgment. *Held*, that the deed would not be set aside on the ground of undue influence at the suit of the heirs of the grantor. In order to warrant such relief one party must have gained an unconscionable advantage over the other by improper means and practices. *Ibid.*

DE FACTO corporation. See RELIGIOUS SOCIETIES, 2.

DEFAULT. See JUDGMENT, 1, 2.

DEFICIENCY, Judgment for. See JUDGMENT, 6.

DEFINITIONS. See WORDS AND PHRASES.

DELAY in bringing action. See EQUITY, 2. FRAUDULENT CONVEYANCES, 7.

DEMURRER. See APPEAL, 16. LIMITATION OF ACTIONS, 4.

DIRECTING VERDICT. See PRACTICE.

DISCONTINUANCE. See ACTION, 3. MANDAMUS, 2.

DISCRETION. See APPEAL, 17, 18. CRIMINAL LAW, 15. INJUNCTION. MORTGAGES. OFFICERS, 2. PLEADING, 2, 3. VERDICT, 3, 5.

DISTRICT ATTORNEY. See CRIMINAL LAW, 10, 14, 15.

DIVORCE. See GUARDIAN AND WARD.

DOGS worrying sheep: Damages. See ANIMALS.

DUPLICITY in special verdict. See MUNICIPAL CORPORATIONS, 16. VERDICT, 7.

ELECTIONS.

See OFFICERS.

1. A certificate of the result of an election which was signed by one inspector only, but had the name of another inspector written thereon by a person having no authority to do so, is not *prima facie* evidence of the facts therein stated, even conceding that the duty to sign the certificate might be delegated. *State ex rel. Bell v. Conness*, 425

2. In an action to test the title to an office the exclusion of testimony of admissions made by voters as to their qualifications and for whom they voted is not error unless the offer thereof was definite as to the time when such admissions were made and as to their substance. *Ibid.*

3. In an action to test the title to the office of town chairman, for which the relator received 253, and the respondent 262, votes, the court found that thirty-one of the votes cast were illegal, and it was reasonably certain that the illegal votes were largely in excess of that number. The evidence was insufficient to show that the relator was entitled to the office, but it appeared, among other things, that both the relator and the respondent connived to secure for themselves the votes of a large number of nonresidents employed in logging camps; that a large number of such men were paid, in the interests of defendant, for the time spent in going to the polls; that liquor

was supplied to such an extent that hundreds became intoxicated and the polls were surrounded by a drunken mob; that these men were permitted by the inspectors to vote without challenge, although their ineligibility must have been known; that a number of residents were supplied with orders on the poor fund just before election, under circumstances giving rise to a just suspicion that it was done to influence votes; and that the respondent peddled a "blue ticket" which seems to have been given prominence during electioneering and must have been prepared for some purpose of identification. *Held*, that the trial court should have declared the election void. *Ibid.*

EMINENT DOMAIN. See HIGHWAYS. MUNICIPAL CORPORATIONS, 9–12. TELEGRAPHS.

ENTIRE CONTRACT. See ATTORNEYS, 8, 9.

EQUITY.

See ACTION, 4–7. CORPORATIONS, 10, 15, 27. DEEDS. FRAUDULENT CONVEYANCES, 7. JUDGMENT, 7. MORTGAGES. MUNICIPAL CORPORATIONS, 5, 8. OFFICERS, 1, 2. PARTNERSHIP. RELIGIOUS SOCIETIES, 4. TAX TITLES. TELEGRAPHS, 4.

1. A court of equity will not entertain an action to set aside a deed after the grantee, founding his claim thereon, has acquired title by adverse possession. *McCann v. Welch*, 142

2. In an action, brought nearly fourteen years after the execution of a conveyance of land by a wife, then *in extremis*, to her husband, to set it aside on the ground that the grantor did not have mental capacity to execute it, it appeared that when it was executed the children of the grantor and grantee were all present, all of full age, and all so conducted themselves that the scrivener understood that the conveyance was in accord with their wishes; that one of them, at least, had accepted pecuniary benefit from the mortgaging of the farm by the grantee; that at all times they had reason to anticipate that their father might convey the land for his own benefit, but made no objection until after he had conveyed it to a daughter and she, with knowledge of all this conduct, had subjected herself to contractual burdens which she probably would not have assumed had there been a timely assertion of plaintiffs' claim; and that in the meantime the means of defense had been seriously impaired by death, insanity, and impairment of memory of disinterested witnesses. *Held*, that although the statute (sec. 4221, Stats. 1898) barring the action was not pleaded, and assuming that as to said children the possession of the father was not adverse, yet their delay and its attendant circumstances were such that as to them a court of equity should refuse to entertain the action. *Ibid.*

3. In an equitable action the objection that there is an adequate remedy at law is waived by service of an answer in which such objection is not raised. *Johnson v. Huber*, 282

4. Plaintiff's father, as security for a loan of money, conveyed land and took back a land contract. He assigned the contract to plaintiff, but the assignment was not recorded. They continued to live upon the land, and obtained from defendant building material for use thereon. Plaintiff intended to become the debtor for such material, but defendant supposed the father was the purchaser. Afterwards defendant commenced an action against the father to enforce a lien for such material on the land, but plaintiff, supposing he was

the person intended to be sued, appeared and answered. On the trial he discovered the mistake, and withdrew his answer without disclosing the true state of the title, and thereafter kept silent until defendant, with his knowledge, had incurred the expense of obtaining a lien judgment and was proceeding to enforce it. Plaintiff then had the assignment of the land contract recorded, and brought this action to restrain the enforcement of the lien judgment and quiet his title as against it. *Held*, that equity would not aid him, but, for the purposes of the action, would consider the father as the owner of the land. *Radant v. Werheim Mfg. Co.* 600

ESTATE in land. See ADVERSE POSSESSION, 4.

ESTATES OF DECEDENTS.

See CORPORATIONS, 7. WILLS.

1. In an action to recover for the support of a person since deceased the evidence of the mutual participation by the plaintiff and his mother in maintaining the household wherein the deceased was supported is *held* sufficient to take to the jury the question whether they jointly participated in furnishing the support. *Dodge v. O'Dell's Estate*, 296

2. In an action against an estate to recover for support furnished the deceased in her lifetime, the estate is *held* not to have been prejudiced by the admission of evidence tending generally to show that the deceased had had trouble with her relatives just prior to the time when the support commenced. *Ibid.*

3. A judgment allowing a claim against a deceased person in proceedings to settle his estate in a court of Minnesota, is affected the same as any other claim against the estate of such person in process of administration in a county court of this state, by sec. 3844, Stats. 1898, barring all claims against the estate if not filed within the time limited therefor under sec. 3840. *Fields v. Estate of Mundy*, 383

4. Sec. 3840, Stats. 1898, providing for a time limit to be fixed by the court for the filing of claims against the estate of a deceased person, and notice thereof to be given to all persons interested, if complied with by the fixing of such time and the giving of such notice, furnishes the exclusive remedy for the collection of such claims; and if they be not filed within the time so limited they will be barred by sec. 3844. Such sections admit of no exception on account of nonresidence of a claimant or the fact that his claim may have been allowed against the estate of the same person in a foreign jurisdiction. *Ibid.*

ESTOPPEL. See EQUITY, 4. TAX TITLES, 2.

EVIDENCE.

See BAILMENTS. COUNTIES, 1, 7. CRIMINAL LAW, 1–7, 12, 13, 17, 18. ELECTIONS, 1, 2. ESTATES OF DECEDENTS, 1, 2. FALSE IMPRISONMENT, 2, 3. FRAUD, 1, 4. INSTRUCTIONS TO JURY. INSURANCE, 1. LIENS, 1. LOGS AND LOGGING, 1. MALICIOUS PROSECUTION, 1. NEW TRIAL. PARTNERSHIP, 2. SALE OF CHATTELS, 10. STREET RAILWAYS, 3, 4.

Considerable strictness should be exercised in excluding leading questions put to expert witnesses; but errors in allowing such questions

to be answered will not work a reversal unless prejudicial to the appellant. *Nicoud v. Wagner,* 67

EXCEPTIONS. See APPEAL, 11-15.

EXCESSIVE DAMAGES. See DAMAGES, 4.

EXECUTIONS.

See JUDGMENT, 7.

Sec. 2968, Stats. 1898 (providing that execution shall not be issued upon any judgment after twenty years from its rendition), and sec. 2900 (providing that execution on a judgment transcripted from justice's court shall not issue after the period of the lien thereof on real estate, viz. ten years from the date of rendition) are not in conflict and both must be enforced. *McCormick v. Ryan,* 209

EXECUTORS AND ADMINISTRATORS. See CORPORATIONS, 7. ESTATES OF DECEDENTS. WILLS.

EXEMPLARY DAMAGES. See DAMAGES, 1, 2. FALSE IMPRISONMENT, 3. STREET RAILWAYS, 3, 4.

EXPERT TESTIMONY. See CRIMINAL LAW, 5, 12.

FALSE IMPRISONMENT.

1. Arrest and detention of a person guilty of the larceny of money, not for the purpose of taking him before a magistrate, but solely to compel and induce him to repay, was not justifiable, and constituted false imprisonment. *Bergeron v. Peyton,* 377

2. In an action for such false imprisonment it was error to permit the plaintiff to testify that he was a married man and had a family. *Ibid.*

3. It was also error to permit the plaintiff to prove that subsequent to his arrest one of the defendants commenced a civil action against him and garnished the chief of police, who was supposed to have the money, even though the court charged the jury not to allow damages by way of punishment. *Ibid.*

4. An instruction to the jury that they should take into consideration the question of injury to plaintiff's reputation, and assess such sum as damages as would fairly compensate him for "the injury, if any, to his reputation," *held* error, especially as the court had limited the recovery to compensatory damages, and no special damages were alleged as to any such injury. *Ibid.*

5. An instruction that the jury should not return a verdict for a mere nominal amount; that if the plaintiff had been falsely imprisoned he was entitled to substantial damages; and that they were the judges of how much such damages should be, also *held* error. *Ibid.*

FALSE REPRESENTATIONS. See ACTION, 1, 2. BANKS AND BANKING, 6. CORPORATIONS, 2, 3.

FEELINGS, Injury to. See DAMAGES, 3. LIMITATION OF ACTIONS, 1.

FEES of attorneys: Lien. See ATTORNEYS, 1, 2.

FELLOW-SERVANTS. See MASTER AND SERVANT, 6. RAILROADS, 3.

FINDINGS of referee, when set aside. See REFERENCE.

FISH AND GAME WARDENS. See COUNTIES, 2, 6.

FORECLOSURE. See JUDGMENT, 5, 6. MORTGAGES. TAX TITLES, 2, 3.

FOREIGN CORPORATIONS. See APPEAL, 1. CORPORATIONS, 16–22.
FOREIGN JUDGMENTS. See ESTATES OF DECEDENTS, 3, 4. JUDGMENT, 8.
FORNICATION. See CRIMINAL LAW, 15–17.

FRAUD.

See ACTIONS, 1, 2, 4–7. ATTORNEYS, 7. BANKS AND BANKING, 6. BILLS AND NOTES. CORPORATIONS, 1–3, 5, 8–12. DEEDS. FRAUDULENT CONVEYANCES. JUDGMENT, 7. SALE OF CHATTELS, 11.

1. That alleged confederates in a conspiracy to defraud one of his real estate by inducing him to exchange it for other property of little value were such in fact, may be established by circumstantial evidence. *Horton v. Lee,* 439
2. The conduct of the owner of land worth $1,800 in trading it for land in a distant county, of comparatively little value, without any personal knowledge or attempt to gain personal knowledge thereof, is not reasonably explained by evidence tending to show that he was anxious to place his land beyond the reach of his sister who he feared would make some claim on account of it. *Ibid.*
3. If property offered for sale or exchange be in a distant locality, and the vendee, to the vendor's knowledge, has no personal information in regard to it, and the latter misrepresents its value or quality for the purpose of inducing a trade and by artifice prevents the former from seeking information elsewhere or by a personal examination of the property, such misrepresentations are not mere expressions of opinion, but misrepresentations in respect to a material fact, satisfying the calls of actionable fraud in that regard. *Ibid.*
4. Where by means of a fraudulent conspiracy in such a case the defrauded party had been thoroughly convinced that by trading he could turn his farm into money for much more than its real value, pretended indifference on the part of the owner of the distant land, and intimations that the former should examine it before making the trade, are not evidentiary of fair dealing and freedom from fraudulent purpose on the part of the latter. *Ibid.*

FRAUDS, STATUTE OF. See ADVERSE POSSESSION, 4.

FRAUDULENT CONVEYANCES.

1. A finding that a chattel mortgage and an assignment of book accounts to the mortgagor's father, and the disposal of the property by the latter, were all in good faith to pay a debt, and not to hinder, delay, or defraud the creditors of the mortgagor, is *held* to be sustained by the evidence. *Shepard v. Ostertag,* 82
2. The capital stock of a corporation is not to be reckoned as a liability when determining its solvency as to creditors. *Hamilton v. Menominee Falls Quarry Co.* 352
3. As against either existing or subsequent creditors a solvent corporation may dispose of property for an inadequate consideration or by voluntary conveyance, if there is no actual intent to defraud creditors and the corporation is not rendered insolvent by the transaction. *Ibid.*
4. So far as the validity of a transfer of corporate property depends on the solvency of the company, it must be considered on the basis of then existing values of property, and not in the light of subsequent changes. *Ibid.*

5. Insolvency, in such connection, does not mean an insufficiency of quick assets to pay all debts at once, nor the inability to meet commercial obligations as they fall due in the course of business, but that the property of the corporation, real and personal, estimated at a fair and reasonable valuation, is substantially less than its debts. *Ibid.*

6. The evidence in this case is *held* to show, contrary to a finding of the trial court, that at the time of a conveyance by a corporation its assets largely exceeded its liabilities and that the transfer did not render it insolvent. *Ibid.*

7. In March, 1890, a corporation conveyed a stone quarry to a new corporation having the same stockholders. In December, 1891, the grantor made an assignment for the benefit of creditors. In March, 1892, the grantee of the quarry conveyed it to defendant, also a new corporation but having in part different stockholders. On November 1, 1894, the assignee of the original grantor brought an action to set aside said conveyances on the ground that they were fraudulent and void as to creditors of his assignor, alleging that the assignor was insolvent when it conveyed the quarry and that the conveyance was without consideration. The books and papers of the assignor, showing all the facts relied upon by the plaintiff, had been in his posssession since the assignment, but an examination of them by an expert was not begun until in December, 1892, and no report thereon was made until a year later. Defendant had been in possession of the quarry ever since the conveyance to it, and had spent large sums in improving it and establishing the business, without any suggestion from plaintiff, until the action was commenced, that the title was defective. *Held*, that, even if the delay in the examination of the books was necessary, yet the subsequent delay for nearly a year in bringing the action, while defendant went on investing its money and incurring liabilities, constituted such laches as would bar plaintiff from equitable relief. *Ibid.*

GAMBLING CONTRACTS. See PARTNERSHIP, 2.

GAME WARDENS. See COUNTIES, 2, 6.

GARNISHMENT. See JUSTICES' COURTS.

GOOD FAITH. See ADVERSE POSSESSION, 1, 3.

GUARDIAN AND WARD.

1. Where the father of minor children whose custody had been awarded to his divorced wife applied to be appointed their guardian after her death, the fact that for several years prior to the hearing, so far as morality and integrity are concerned, he had lived a correct life, is not so conclusive upon the question of his suitableness for the guardianship as to preclude the court from looking into the circumstances which led to the divorce. *McChesney's Appeal*, 315

2. The fact that the mother of the children had attempted to appoint their grandmother as testamentary guardian was properly considered by the court as bearing on the propriety of her appointment in case the father was found an unsuitable person for the trust. [Whether a mother to whom the custody of her minor children has been awarded by the decree divorcing her from their father has a legal right to appoint a testamentary guardian for them, under sec. 3965, Stat. 1898, authorizing the father of a child, if living, and in case of his death the mother, by last will to appoint a guardian therefor, not determined.] *Ibid.*

3. The fact that the father had neglected to visit his dying infant son, and had permitted the funeral of the boy to be held unnoticed by him, after special pains had been taken by the mother to remove all obstacles to his visiting the dying boy and attending the funeral, is sufficient, in the absence of some clear explanation, to sustain a finding that he had no fatherly love for his remaining children. *Ibid.*

4. A groundless suspicion expressed by the father as to the paternity of his children is entitled to weight in determining whether he is a suitable person to have their care and custody. *Ibid.*

HIGHWAYS.

See LOGS AND LUMBER, 2. MUNICIPAL CORPORATIONS, 3–25. TELEGRAPHS.

Subject only to the public easement, the owner of land abutting on a street owns the fee to the center of the street, and neither the legislature nor municipal authorities can authorize the taking or incumbering of the street for purposes inconsistent with its public use without the consent of the owner, unless some provision for compensation has been made. *Krueger v. Wis. Tel. Co.* 96

HOMICIDE. See CRIMINAL LAW, 1–11.

HUSBAND AND WIFE. See ADVERSE POSSESSION, 2. CRIMINAL LAW, 4. GUARDIAN AND WARD. MUNICIPAL CORPORATIONS, 20. STARE DECISIS. WILLS.

IMPEACHMENT of witnesses. See CRIMINAL LAW, 2, 3, 7.

IMPROVEMENTS: Assessments. See MUNICIPAL CORPORATIONS, 3–13.

INFANTS. See GUARDIAN AND WARD.

INJUNCTION.

See EQUITY, 4. JUDGMENT, 7. OFFICERS, 1, 2. RELIGIOUS SOCIETIES, 3, 4.

1. The refusal of an injunction *pendente lite* is a matter resting in sound discretion. *Ward v. Sweeney,* 44

2. It is as pleadings that allegations are to be liberally construed, not as assertions of fact to support injunctions. For the latter purpose they should be carried no farther than the necessary force of their words, and in weighing them the court may use its knowledge of the counsel who prepared and the party who verified them. *Ibid.*

INSANITY. See CRIMINAL LAW, 5.

INSOLVENCY. See BANKS AND BANKING. CORPORATIONS, 16–27. FRAUDULENT CONVEYANCES. VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See APPEAL, 12–15, 22–24. CRIMINAL LAW, 6–9, 13. FALSE IMPRISONMENT, 4, 5. LOGS AND LOGGING, 2. MALICIOUS PROSECUTION, 2, 3. STREET RAILWAYS, 3, 5.

Where testimony merely negative in its character has been received, the court should upon request instruct the jury that such testimony is entitled to comparatively little weight as compared with the positive testimony of equally credible witnesses. *Hildman v. Phillips,* 611

INSURANCE.

Accident: Waiver of defense: Evidence.

1. In an action upon an accident policy, the question being whether there had been a waiver of the defense of breach of a warranty in the application that the applicant then had no other similar insurance, a letter written by the insurer from which its knowledge of other insurance *at the time of the accident* might be inferred is not evidence of its knowledge that there was other insurance at the time of the application. *Morris v. Nat. Protective Society,* 92

Life: Designation of beneficiary: Assignment.

2. Under a tontine life insurance policy payable to the executors, administrators, or assigns of the assured, and giving him no power to designate a different beneficiary, he can confer no rights upon any one except by assignment; and in order to create a new and specific beneficiary a new contract with the insurer is necessary. *Alvord v. Luckenbach,* 537

3. Under such a policy a letter from the insured to the company requesting it to make the insurance payable, in case he died before the policy matured, to certain designated persons, did not amount to an assignment of the policy to such persons, and, in the absence of assent on the part of the company, conferred no rights upon them to demand payment of the insurance. *Ibid.*

Fire: Consolidated action: Separate judgment: Notice of appeal. See APPEAL, 8.

INTERSTATE COMITY. See COMITY.

JOINT claims. See ESTATES OF DECEDENTS, 1. VERDICT, 4.

JOINT and several liability. See CORPORATIONS, 12, 13.

JOINT tort. See ANIMALS, 2.

JUDGMENT.

Order or judgment? See APPEAL, 2.

Separate judgments in consolidated action. See APPEAL, 8.

By default: Jurisdiction.

1. Personal service of a summons, in order to give jurisdiction of the person, must be made within the state; and the fact that service was so made is an essential element of the proof of service required for the entry of judgment upon default under sec. 2891, Stats. 1898. *Zimmerman v. Gerdes,* 608

2. A judgment taken by default without jurisdiction over the person of the defendant and in defiance of sec. 2891, Stats. 1898, will be reversed on appeal, notwithstanding the appeal was a general one from the whole judgment. *Dikeman v. Struck,* 76 Wis. 332, so far as it holds to the contrary, overruled. *Ibid.*

For deficiency on foreclosure. See JUDGMENT, 6.

In equity: Avoiding circuity. See CORPORATIONS, 10.

Res judicata: Estoppel. See TAX TITLES, 2.

Upon whom binding: Parties. See CORPORATIONS, 17.

Transcripts from justices' courts. See EXECUTIONS.

Correction of clerical mistakes.

3. A clerical mistake in a judgment, whereby it fails to correctly express the decision pronounced, may be corrected by the court with-

out regard to time, saving the rights of innocent third persons, if no equity of any party to the record be thereby violated. *Bostwick v. Van Vleck,* 387

4. A clerical mistake in a judgment, subject to correction as above indicated, exists where there has been an attempt to preserve of record the judgment actually pronounced, not where there has been an erroneous omission to pass upon some material question or such a question erroneously passed upon. *Ibid.*

5. The correction of a mere clerical mistake in a judgment of foreclosure does not make a new judgment. The corrected judgment will stand as effective for all purposes as if properly entered in the first instance. *Ibid.*

6. If a sale, pursuant to a judgment of foreclosure of a mortgage, be set aside because of a clerical mistake therein, and a resale be ordered, a judgment for a deficiency rendered pursuant to the report of the first sale should be set aside, because the remedy for the collection of the mortgage indebtedness by a sale of the entire mortgaged property must be exhausted as a condition precedent to such a judgment. *Ibid.*

Equitable relief against enforcement.

7. An attempt to enforce a judgment in violation of an agreement for the settlement thereof which has been consummated by the judgment debtor by making payments as agreed, is inequitable and fraudulent, and a court of equity will restrain such enforcement and require the removal of the cloud caused by such judgment on the title to land. *Johnson v. Huber,* 282

Reversal on appeal. See APPEAL, 19-24.

Foreign judgments: Faith and credit: Limitations. See ESTATES OF DECEDENTS, 3, 4.

8. The full faith and credit clause of the federal constitution, as regards the effect of judicial proceedings of one state in the courts of another, does not militate against the effect of a statute of limitations of this state, as regards the remedy to enforce claims, whether based on judgments in the courts of another state or not. *Fields v. Estate of Mundy,* 383

JUDGMENT ROLL. See APPEAL, 6.

JURISDICTION. See APPEAL, 25. DISCONTINUANCE. JUDGMENT, 1, 2. JUSTICES' COURTS. REMEDIES. SCHOOLS, 2. VOLUNTARY ASSIGNMENT, 2.

JURORS.

See APPEAL, 21.

1. Where a defense is that the acts complained of were done pursuant to the by-laws of a liverymen's union to which defendants belonged, jurors may, as a basis for challenge either for cause or peremptory, be asked as to their being biased against unions. *Gatzow v. Buening,* 1

2. The improper exclusion of questions put to jurors on their examination is waived by failure to object to the collected jury. *Ibid.*

JUSTICES' COURTS.

See EXECUTIONS.

Notwithstanding sec. 3727, Stats. 1898 (providing that no judgment shall be rendered against a garnishee by a justice of the peace, or

any money or property required to be delivered by him to the justice, by reason of any money owing by him to the defendant, unless it shall have become due absolutely and without depending on any future contingency, and that claims for mechanics' liens shall prevent any indebtedness from the owner being due absolutely until such liens shall have been disposed of or shall have expired), an order requiring the garnishee to pay into court the amount of the indebtedness from him to the defendant, which was subject to claims for mechanics' liens, is within the jurisdiction of the justice, and, although erroneous, cannot be reviewed upon *certiorari*. *Krueger v. Cone*, 522

LACHES. See EQUITY, 2. FRAUDULENT CONVEYANCES, 7.

LANDLORD AND TENANT.

Unless it is shown that the special circumstances were brought to the knowledge of the lessor at the time of the leasing of a dwelling house, damages for his failure to give the lessee possession of the premises cannot include loss of prospective profits of a business which the lessee was prevented by such failure from entering upon in the place where such house was located, nor the freight paid by him for moving his household goods to such place. *Serfling v. Andrews*, 78

LARCENY. See CRIMINAL LAW, 19.

LEADING QUESTIONS. See EVIDENCE.

LIENS.

Of attorneys at law. See ATTORNEYS.

Of mechanics, etc., for labor and material. See EQUITY, 4. JUSTICES' COURTS.

1. Unless a proper foundation therefor has been laid, oral testimony is incompetent to show compliance with the provision of sec. 3315, Stats. 1898, requiring subcontractors who claim a lien to give written notice thereof to the owner of the property affected. *Rosholt v. Corlett*, 474

On logs and timber.

2. The owner of land had contracted to sell and deliver the hemlock logs cut therefrom to one person and the other logs to another. Plaintiff worked for said owner promiscuously, as might be convenient, upon both classes of logs before their delivery. *Held*, that his lien for the whole of such labor might be enforced against any part of the logs. *Blonde v. Menominee B. S. L. Co.* 540

Of special assessments: Ownership. See MUNICIPAL CORPORATIONS, 13.

For taxes paid by mortgagee. See TAX TITLES.

LIFE INSURANCE. See INSURANCE, 2, 3.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. ATTORNEYS, 8, 9. EQUITY, 2. ESTATES OF DECEDENTS, 3, 4. JUDGMENT, 8. PLEADING, 2, 3.

1. Subd. 5, sec. 4222, Stats. 1898 (providing that no action to recover damages for "an injury to the person" shall be maintained unless notice shall have been given as therein prescribed within one

year after the happening of the event causing such damages), refers to bodily injuries and does not apply to an action for loss of money and injury to the feelings caused by an unlawful conspiracy and the acts done pursuant thereto. *Gatzow v. Buening,* 1

2. Said subd. 5, sec. 4222, Stats. 1898, prescribes a limitation upon the remedy, not a condition of the right itself, and the objection that the notice was not given is waived if not taken by demurrer or answer. *Ibid.*

3. A statute (in this case subd. 5, sec. 4222, Stats. 1898) requiring a notice to be given prior to the commencement of an action to enforce a common-law right does not prescribe a condition precedent to the cause of action, but is in the nature of a statute of limitations; and the objection that the notice was not given is waived unless taken by answer or demurrer. *Weed & G. Mfg. Co. v. Whitcomb,* 101 Wis. 226, and *Ryan v. C. & N. W. R. Co.* 101 Wis. 506. so far as they hold to the contrary, overruled. *Meisenheimer v. Kellogg,* 30

4. In such a case the objection that a sufficient notice was not given is not raised by a general demurrer, even though a copy of the notice given is annexed to and made a part of the complaint. *Ibid.*

LOGS AND LOGGING.

See LIENS, 2.

1. On the issue whether there was a contract between plaintiff and defendant that the latter should contribute to the repair and maintenance of a logging road to be jointly used by them, it was error to permit defendant to introduce in evidence a written contract between himself and third persons giving him the right to haul timber over roads made or used by them, such roads covering a portion of the road in controversy. *Thomas v. Parrott,* 605

2. An instruction to the jury that "a party going in the woods and finding a logging road or finding a public road had a right to go on and use it" is error, there being no such right in regard to mere private roads. *Ibid.*

3. No agreement to pay for the use of a road on lands owned by another person can be implied unless the conventional relation of landlord and tenant exists. *Ibid.*

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, where punitory as well as compensatory damages are recoverable, the financial circumstances of the defendant may be shown by evidence of his reputed wealth. *Draper v. Baker,* 61 Wis. 450, followed. *Eggett v. Allen,* 633

2. Where justification under advice of counsel was not at issue in such a case, instructions to the jury based on the assumption that it was, thus distracting the attention of the jury from the real issue, were erroneous. *Ibid.*

3. An instruction that probable cause, as relating to the commencement of a criminal prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a *really cautious* man in the belief that the person accused is guilty of the offense charged, is erroneous; and the error is not cured by correct expressions in the other portions of the charge, indicating that the standard of liability is the belief of a reasonably prudent man. *Ibid.*

MANDAMUS.

See MUNICIPAL CORPORATIONS, 13 (6).

1. In the exercise by the supreme court of its superintending control over inferior courts the writ of *mandamus* will not be used to perform the functions of appeal or writ of error. In order to justify the issuance of the writ the duty of the lower court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by *mandamus* speedy and prompt. *State ex rel. Milwaukee v. Ludwig,* 226

2. A lotowner, on behalf of himself and others, brought an action to restrain a street railway company from accepting an ordinance authorizing extensions of its lines and from constructing one of such extensions along the street in front of his lots. He obtained an injunction *pendente lite,* and defendants moved to vacate it and also secured an injunction restraining plaintiff and all other taxpayers and abutting owners from commencing any similar suit until the determination of said motion. Before such determination plaintiff, acting through attorneys other than his attorneys of record, attempted to discontinue his action under circumstances calculated to arouse suspicion of collusion with defendants. The court permitted plaintiff to withdraw from the action, but refused to allow it to be discontinued, and, on motion of plaintiff's attorneys of record, substituted as plaintiff the owner of land abutting on another street, similarly affected by the ordinance, with leave to adopt the complaint or file a new pleading. *Held,* that under the circumstances the supreme court would not interfere by *mandamus* to reverse the decision of the lower court and compel the dismissal of the action. *Ibid.*

MASTER AND SERVANT.

Master's liability for servant's torts.

1. In an action against saloon-keepers for an assault committed by their bartender upon plaintiff, an intoxicated customer who had refused to pay for drinks, it is *held,* on the evidence, that the question whether the assault was personal, or was committed with the purpose or in the line of enforcing payment, was properly left to the jury. *Bergman v. Hendrickson,* 434

2. If the bartender committed the assault for the purpose of collecting pay for his employers' liquor, he was acting within the scope of his employment, and his employers are liable, even though the servant may have been expressly prohibited from performing the duty in that manner. *Ibid.*

3. In such a case the fact that the person assaulted conducted himself in an improper manner, calculated to arouse and bring on personal altercation with the bartender, and that the assault was wholly or in part the result of such misbehavior, does not relieve the employers from liability, if the bartender was acting within the scope of his duties. *Ibid.*

Liability for injuries to servants. See RAILROADS, 3.

4. In an action for personal injuries alleged to have been caused by defects in a traveling crane in the factory in which plaintiff was employed, it is *held* that the evidence was sufficient to support a finding by the jury to the effect that the crane in use at the time of

the accident was the same one that had previously been reported to defendant as defective and unsafe, and also findings that the crane was in fact defective and that its defective condition was the proximate cause of the injury. *Nicoud v. Wagner*, 67

5. The evidence is *held* also to have justified the inclusion, in hypothetical questions, of the element of plaintiff's insensibility shortly after the accident. *Ibid.*

6. Plaintiff's intestate, while working for defendants at the bottom of a mine shaft, was struck and fatally injured by a descending ore tub. Upon the evidence it is *held* that the proximate cause of the accident was not the incompetency of a boy assistant, nor the insufficiency of the hoisting apparatus, but the negligence of a co-employee at the top of the shaft, and hence that there could be no recovery. *Adams v. Snow*, 152

MAXIMS.
Caveat emptor, 445.
Omnia præsumuntur rite esse acta, 595.
Res judicata pro veritate accipitur, 240.
Respondeat superior, 438.
Stare decisis, 240, 547, 575.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS. See EQUITY, 4. JUSTICES' COURTS. LIENS, 1.

MEDICAL EXPERTS. See CRIMINAL LAW, 5, 12.

MINORS. See GUARDIAN AND WARD.

MISTAKE. See JUDGMENT, 3-6. PARTNERSHIP, 1.

MONOPOLIES.

See DAMAGES, 3.

1. A combination of liverymen to limit their services to persons patronizing them exclusively, and to monopolize the livery business in Milwaukee, including service for funerals and to carry prices to and maintain them at such a level as the combination might see fit to adopt, and to so stifle competition in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, is unlawful as against public policy. *Gatzow v. Buening*, 1

2. Such a combination is none the less unlawful because existing under a self-imposed constitution and governed by by-laws and conducting its operations in a public or semi-public way: and the fact that they acted in accordance with their obligations to the association will constitute no protection to its members as regards liability for compensatory damages to a person specially injured by their overt acts done in pursuit of the purposes of the organization. *Ibid.*

3. A member of such a liverymen's association let a hearse and carriage to plaintiff for the funeral of his child, but, upon learning that the person in charge was an undertaker and liveryman doing an independent business, joined with the secretary of the association, in accordance with its rules, in sending the vehicles away from plaintiff's house. This was done just as they were about to be used, regardless of the fact that such action would inevitably shock and greatly distress the plaintiff, in order to demonstrate the power of the association to punish independent liverymen and persons dealing with them. *Held*, that such acts were unlawful

and rendered the wrongdoers liable for actual and also for exemplary damages. *Ibid.*

4. Even though a combination may not be in itself unlawful as an unreasonable interference with trade or individual freedom, yet overt, unlawful acts by two or more of its members acting by agreement to carry out its purpose, will render the combination, as to them, unlawful. *Ibid.*

MORTGAGES.

See ACTION, 4–7. JUDGMENT, 5, 6. TAX TITLES.

While mere inadequacy of price is not a sufficient ground for setting aside a foreclosure sale, such inadequacy may be considered in connection with any mistake, inadvertence, misapprehension, fraud, or misconduct which prevented persons from bidding at the sale a much larger price; and the setting aside of the sale under such circumstances, being a matter resting in the sound discretion of the trial court, will not be disturbed except for an abuse of such discretion. *John Paul L. Co. v. Neumeister,* 248

MUNICIPAL CORPORATIONS.

Officers: Election and term of office. See OFFICERS.

Salaries: Agreement for less compensation.

1. Under a charter providing that the city officers shall receive salaries to be fixed annually by the common council and not to be increased or diminished during their terms of office, an agreement between an officer and the mayor, entered into after the appointment of the former, by which he was to receive a certain sum *per diem* in lieu of the salary fixed by the council, is void. *Rettinghouse v. Ashland,* 595

2. The salary of the officer who had entered into such agreement was not paid monthly as the charter provided, but when about two-thirds of the term had expired he filed a claim for a sum less than the amount of salary then due him, as being in full for his services for the entire year, and the same was allowed and paid. *Held,* that this did not constitute an accord and satisfaction. *Ibid.*

Authority over streets: Eminent domain. See HIGHWAYS.

Improvements: Assessment of benefits, etc.

3. An assessment of benefits to abutting lots from the grading and paving of an alley charged each lot with as many dollars as it had feet of frontage, and the aggregate very closely approximated the total cost of the work. Opposite some of the lots a deep cut was necessary, and opposite others much filling, but no damages were awarded in any instance. *Held,* as found by the trial court, that the assessment was an arbitrary one, based solely upon the cost of the work, and was therefore illegal and void. *Kersten v. Milwaukee,* 200

4. Under sec. 6, subch. VII, of the charter of Milwaukee (ch. 184, Laws of 1874, as amended), an alley may be graded without a petition from abutting owners, if the council follows the technical course of procedure therein mapped out. *Ibid.*

5. Where an assessment for street improvements is arbitrary and fraudulent, the remedy by appeal to the circuit court provided by sec. 11, subch. VII, of said charter, is not exclusive, but the person aggrieved may resort to a court of equity. *Harrison v. Milwaukee,* 49 Wis. 247, and other cases, followed. *Ibid.*

6. Where, in an action to set aside a special assessment for street improvements, the assessment is held invalid by reason of defects in the assessment of benefits and damages, it is the duty of the court under sec. 1210e, Stats. 1898, to stay proceedings so far as relates to the assessment of benefits and damages, order a reassessment, and make the payment of the amount finally determined a condition of judgment; and the fact that plaintiff also sought relief for an invasion of his premises by reason of the improvement need not interfere with a complete application of the statute to the situation. *Ibid.*

7. If, upon the making of such reassessment, it is made to appear that the former assessment has been paid, the court will take that into consideration and not require a double payment. *Ibid.*

8. Where the initial steps necessary to give the city the right to improve an alley had been taken, but subsequent proceedings were void because of defects in the assessment of benefits and damages, a court of equity should not, after the completion of the work, require a restoration of the alley to its original condition without a showing that such relief would be equitable to other abutting owners. *Ibid.*

Taking land for street: Setting off benefits and compensation.

9. Under sec. 6, subch. VI, of the La Crosse city charter (ch. 162, Laws of 1887, as amended by ch. 492, Laws of 1889), relating to the determination, by commissioners, of the compensation to be made for land proposed to be taken for street purposes and of the damages and benefits arising from the proposed improvement, the compensation and damages on the one side and the benefits on the other are to be offset, and only the difference between them is to be paid by or to the owner. *Koller v. La Crosse,* 369

10. The award of the commissioners in such proceedings is either valid or invalid as a whole, and cannot be made the basis of a recovery of the value of the land taken, independent of the benefits assessed or attempted to be assessed to the remaining part of the same lot or parcel. So *held* in a case where the commissioners had failed to strike the balance, as required by the charter, between the value of the land taken and the benefits, and the land not taken had been sold at a tax sale for the full amount of the benefits attempted to be assessed against it. *Ibid.*

11. In an action in such a case to recover the value of the land taken as determined by the commissioners the city cannot counterclaim the amount of the benefits assessed. *Ibid.*

12. [Whether the excess of benefits over the value of the land taken can be made a personal liability against the lotowner, not determined.] *Ibid.*

Assessment liens: Ownership: Collection.

13. The city charter of the city of Superior provides generally for making up the annual city tax roll and extending thereon all general and special taxes against property mentioned and valued therein, upon a uniform percentage thereof, and also for extending on such roll special assessments for street improvement in a separate column against the property affected thereby for the benefit of the owners of the certificates representing such assessments, and for the collection of such burdens on property, and for the disposition of all taxes collected, not specially mentioning such assessments; also, generally, that delinquent returns shall be made to the county treasurer according to the laws regarding such returns by town treasurers. It also specially provides, in plain language,

for the return of special assessments not seasonably paid to the city treasurer, and the enforcement thereof thereafter in the manner other delinquent taxes are enforced, "except that all moneys collected by the city treasurer and all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon surrender of such certificate." *Held:*

(1) There is no room to work out, by judicial construction, a theory that the special assessment liens, or money collected in the enforcement thereof in any way, at any time, under any circumstances, become the property of the public represented by the city or county.

(2) The plain legislative intent is that special assessment liens shall constitute private property till actually discharged by payment to the owners thereof, or to the city treasurer, county treasurer, or county clerk, for the use of such owners, and that such liens shall be enforced as such private property through municipal machinery as the agent of such owners.

(3) The rule applies that, where there is a general provision in a statute covering an entire subject, and a special provision plainly covering some particular part within the scope of such general provision, such special provision must prevail.

(4) The plain intent being that the special assessment liens shall remain private property from first to last, by necessary implication the assessments extended upon the tax roll to discharge such liens must be returned delinquent, if at all, separate from all other taxes, and thereafter be enforced separate from all other taxes, down to and including the issuance of certificates of sale on the tax sale.

(5) If the money to discharge a special assessment lien comes into the hands of the county treasurer at any time before the sale of the property to enforce it, he thereby becomes a trustee thereof for the certificate holder. If the property be bid in at the tax sale for the county and a certificate of sale be taken accordingly, the treasurer, in his official capacity, will thereby become the trustee of such certificate for the owner of the special assessment lien; and if such certificate be sold by the county treasurer in the manner other tax certificates are sold, the money received therefor will constitute a trust fund in his hands for the benefit of the owner of the special assessment certificate.

(6) If the county treasurer receive a tax-sale certificate or money on account of a special assessment returned to him delinquent in either of the methods above indicated, it is his duty to deliver the same to the owner of the special assessment certificate on demand therefor and the surrender of such certificate; and a failure so to do will entitle the owner of such certificate to the remedy by *mandamus* to enforce his rights. *State ex rel. Donnelly v. Hobe,* 411

Injuries to travelers from defective streets, etc.

14. Although a lot-owner may construct and maintain a hatchway in the sidewalk, covering the opening when not in use so that it will not affect the safety of the walk, and when in use guarding it reasonably to prevent travelers in the exercise of ordinary care from stepping into it, yet if the city knowingly, or with reasonable means of knowledge, permits such opening to be negligently used, it is liable for injuries caused by such use. *Whitty v. Oshkosh,* 87

15. In an action for injuries sustained by falling into an open hatchway in a sidewalk, a complaint stating that plaintiff, in approaching the hatchway, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it, and that she was free from negligence, is held not to show conclusively contributory negligence on plaintiff's part. *Ibid.*

16. In an action against a city for injuries alleged to have been caused by a defect in a street, the jury answered in the negative a question in the special verdict, "Was the defendant guilty of any want of ordinary care in respect to the maintenance of the street in a proper state of repair?" *Held*, that the question covered two controverted issues,—(1) whether there was a defect, and (2) whether, if so, there had been negligence in discovering and repairing it,—and its submission was error prejudicial to plaintiff. *Peake v. Superior*, 403

17. A "defect" in a street is a lack of reasonable safety; and if the jury find both that there was a defect and that the city had constructive notice thereof and time to repair, this establishes negligence without a further finding that the defect was of such a nature that a man of ordinary care and prudence would reasonably expect that an injury might result therefrom to ordinarily careful travelers. *Ibid.*

18. The duty of a city to make a street reasonably safe in its original construction is absolute; but the duty to discover and repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence. *Ibid.*

19. "Ordinary care" in such a case is that degree of care which reasonably vigilant and careful officials would and do exercise under similar circumstances. *Ibid.*

20. Where several and distinct claims for damages may be based upon an injury caused by a defect in a street, the notice given under sec. 1339, Stats. 1898, must show, in order to support an action, that it was given on behalf of the plaintiff. So *held* in an action by a husband for loss of his wife's services, where the only notice of her injury stated that *she* would claim satisfaction, and did not show that she was a married woman, that her husband had sustained any damage, or that he was intending to prosecute therefor. *Parish v. Eden*, 62 Wis. 272, and *Reed v. Madison*, 83 Wis. 171, so far as they are in conflict with the foregoing, overruled. CASSODAY, C. J., concurring in the decision, is of the opinion that neither of said cases need be overruled. *McKeague v. Green Bay*, 577

21. In an action for personal injuries caused by plaintiff's falling, in the night time, into an excavation extending across where the sidewalk had been, the evidence is *held* sufficient to sustain findings of the special verdict that the hole was not properly and safely guarded at the time of the accident, that plaintiff did not know of its existence a short time prior thereto, and that he was not guilty of contributory negligence. *Hildman v. Phillips*, 611

22. The question, in such case, whether the notice of the injury was served within ninety days, as required by sec. 1339, R. S. 1878, is *held*, upon the evidence, to have been for the jury. *Ibid.*

23. Questions as to whether the excavation was properly guarded, and whether the city was guilty of a want of ordinary care in not guarding it, having been submitted for special verdict, it was not error to refuse to submit specific questions as to the maintenance of a lighted red globe lantern on each side of the excavation. *Ibid.*

24. When a traveler exercising ordinary care suffers injury by stepping into a defect in the sidewalk, which was made by the town officials, or had existed so long as to charge them with notice and the duty to repair, such officials cannot be heard to say that they did not anticipate such an occurrence. Where those facts are found in a special verdict, therefore, errors in the instructions relating to a further question as to proximate cause are immaterial. *Brunette v. Gagen*, 618

25. The notice of an injury, given to a city under sec. 1339, Stats. 1898, and the complaint in an action therefor stated in substance that the plaintiff was thrown down and injured by reason of her foot going into a hole in the sidewalk, and specifically described the defect as consisting of a missing board or plank from the sidewalk, which caused a deep hole therein. On the trial she testified to the absence of the board and the resulting hole in the sidewalk, but her testimony further showed that her injury was caused by a loose and slanting board upon which she attempted to walk and which "jumped up" or "rocked," turning her foot and causing it to go into the hole. *Held*, that this failed to show a causal connection between the fall and the defect specified in the notice and complaint, and that a verdict for defendant should have been directed. *Gagan v. Janesville*, 662

Claims against cities: Presentation: Disallowance.

26. The filing of a claim with the city clerk, not its actual introduction into the common council, is its "presentation" to the council for allowance, within the meaning of the provision of the Oshkosh city charter (Laws of 1891, ch. 59, subch. XXI, sec. 4), that failure of the council to pass upon such claim within sixty days after its presentation shall be deemed a disallowance thereof. *Oshkosh Water Works Co. v. Oshkosh*, 83

Appeal from common council. See APPEAL, 25.

MURDER. See CRIMINAL LAW, 1–11.

MUTUALITY. See CONTRACTS.

NEGATIVE TESTIMONY. See INSTRUCTIONS TO JURY.

NEGLIGENCE. See APPEAL, 22. BAILMENTS, 2. MASTER AND SERVANT, 4–6. MUNICIPAL CORPORATIONS, 14–25. PLEADING, 1. RAILROADS. STREET RAILWAYS, 1, 2.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CORPORATIONS, 4, 5.

NEW TRIAL.

A new trial should not be granted on the ground of newly discovered evidence in the absence of a showing that diligence was used to discover and procure such evidence upon the trial. *Johnson v. Goult*, 247

NONRESIDENTS: Claims. See ESTATES OF DECEDENTS.

NONSUIT. See PRACTICE.

NOTICE.
Of discontinuance. See ACTION, 3.
Of appeal. See APPEAL, 3.
Of lien of attorney. See ATTORNEYS, 2.
Of fraud. See CORPORATIONS, 5.
Of claim for lien. See LIENS, 1.
Of injury. See LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 20, 22, 25.
Of dangerous use of hatchway in sidewalk. See MUNICIPAL CORPORATIONS, 14.
Of defect in street. See MUNICIPAL CORPORATIONS, 24.
Of intent to organize, etc. See RELIGIOUS SOCIETIES, 1, 2.
Of nonacceptance of goods. See SALE OF CHATTELS, 8.
Of proposed alteration of district. See SCHOOLS, 2.

NUISANCE. See TELEGRAPHS, 4.

OFFICERS.

Protection against usurpation or intrusion: Equity.

1. A court of equity cannot try the title to a public office; and if it may by injunction protect the incumbent of an office against violent disturbance or usurpation by a claimant thereof, the case should be clear and urgent to justify such intervention. *Ward v. Sweeney,* 44

2. The refusal of an injunctional order in an action by an alderman against persons claiming to be aldermen-elect is *held* not to have been an abuse of discretion, it appearing that the relief sought was merely the keeping of defendants out of office until their right should be legally established; that it was not probable that there would ever be any judgment in the case to be rendered unavailing in the absence of a temporary injunction; and that the injury to plaintiff or any one else from a change in the *status quo* would in no respect be greater than the injury to defendants and to the public from the temporary injunction should defendants' title ultimately be established,—the injury in either event being incapable of being measured in money so as to be protected by an undertaking; and it not being shown by the complaint that there was any real peril of turbulent or riotous disturbance of the orderly proceeding of the city government, and not clearly appearing that the defendants were not entitled to the offices claimed. *Valley Iron Works Mfg. Co. v. Goodrick,* 103 Wis. 436, distinguished. MARSHALL and BARDEEN, JJ., concur in the decision on the sole ground that it does not clearly appear from the complaint that the plaintiff was entitled to the office, and dissent from the opinion of the court in so far as it casts doubt upon or attempts to limit the power of a court of equity to protect a *de facto* officer in office from an intruder. *Ibid.*

Term of office: "Year."

3. How far the general provision of sec. 925—26, Stats. 1898, that aldermen shall hold office for two years, applies to the first aldermen of a city, elected after the beginning of the electoral year, and whether the word "year" in that connection means calendar year or electoral year, i. e. a period terminating with the third Tuesday in April following the regular time of municipal elections (sec. 925—28), not determined. *Ibid.*

Salaries: Agreement to accept smaller sum. See MUNICIPAL CORPORATIONS, 1, 2.

County treasurer. See MUNICIPAL CORPORATIONS, 13 (5, 6). TAXATION, 2–4.

District attorney. See CRIMINAL LAW, 10, 14, 15.

Fish and game wardens. See COUNTIES, 2, 6.

Of corporations: Powers, duties, and liabilities. See BANKS AND BANKING, 6–9. CORPORATIONS, 4–15.

OPINION evidence. See CRIMINAL LAW, 12.

PARENT AND CHILD. See ADVERSE POSSESSION, 2. DEEDS. EQUITY, 2. GUARDIAN AND WARD. WILLS.

PARTIES.

See ACTION, 3. BANKS AND BANKING, 1, 9. CORPORATIONS, 2, 3, 15, 17, 26. MANDAMUS, 2. MUNICIPAL CORPORATIONS, 20.

A defect of parties must be taken advantage of by demurrer if it appears on the face of the complaint, otherwise by answer, or it will be deemed to have been waived. *Radant v. Werheim Mfg. Co.* 600

PARTNERSHIP.

1. The parties were partners. The firm was insolvent and plaintiff was indebted to it. Pending an action by defendant for dissolution and the appointment of a receiver, the parties made an agreement by which defendant was to pay plaintiff $175 for his interest in the property and good will of the business and to assume and pay all existing indebtedness of the firm, no particular amount being specified. By mistake both parties supposed the indebtedness to be about $500 greater than it really was, but it appeared that the assets of the firm were considerably less than its debts and that defendant offered to pay the $175 as a compromise of his action, in order to save the expense of a receivership and the sacrifice of the good will. *Held*, that defendant was not bound to pay plaintiff one half of the $500, the amount in mistake, but plaintiff's only remedy was a rescission of the agreement. *Meinecke v. Sweet*, 21

2. In an action by one partner against his copartner to recover one half of the losses of the business, which consisted of transactions with commission firms on the board of trade in Chicago, the evidence is *held* to show, in spite of plaintiff's testimony that deliveries were contemplated, that the partnership was formed to conduct, and had conducted, a mere gambling business, for the losses in which no contribution could be enforced. *Atwater v. Manville*, 64

PAYMENT, Voluntary. See TAXATION, 1.

PHYSICIANS AND SURGEONS. See CRIMINAL LAW, 5, 12, 13.

PLEADING.

See APPEAL, 18. BANKS AND BANKING, 5. CONSPIRACY. COUNTIES, 4. EQUITY, 3. INJUNCTION. LIMITATION OF ACTIONS, 2–4. MUNICIPAL CORPORATIONS, 25. PARTIES.

1. A complaint will not be held bad on demurrer, on the ground that it discloses contributory negligence, unless the facts leave no reasonable doubt on the question. *Whitty v. Oshkosh*, 87

2. Sec. 2830, Stats. 1898, does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend a pleading. Where there is neither reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for, it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law. *Illinois S. Co. v. Budzisz*, 499

3. In an action of ejectment the allowance, on the day of the trial and without the imposition of terms, of an amendment to the answer, setting up the statutes of limitations, is *held* not to have been, under all the circumstances, an abuse of discretion. *Ibid.*

POLES of telephone lines in highways. See TELEGRAPHS.

POSSESSION of land. See ADVERSE POSSESSION. LANDLORD AND TENANT.

PRACTICE.

See ACTION, 3. APPEAL. ATTORNEYS, 1, 2. CONSTITUTIONAL LAW. COUNTIES, 1–4. COURT AND JURY. CRIMINAL LAW AND PRACTICE. EQUITY, 3. EVIDENCE. EXECUTIONS. INJUNCTION. INSTRUCTIONS TO JURY. JUDGMENT. JURORS. MANDAMUS. MORTGAGES. NEW TRIAL. PARTIES. PLEADING. REFERENCE. VERDICT.

It is not error to direct a verdict for defendant immediately after announcing that a nonsuit is granted. *Adams v. Snow*, 152

PREMEDITATED DESIGN. See CRIMINAL LAW, 1.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTIONS. See ADVERSE POSSESSION, 3. APPEAL, 18. BAILMENTS, 2. TAXATION, 3.

PRIVITY. See ADVERSE POSSESSION, 4.

PROBABLE CAUSE. See MALICIOUS PROSECUTION, 3.

PROCESS.
Abuse. See CONSPIRACY.
Service. See APPEAL, 1. CONSTITUTIONAL LAW. JUDGMENT, 1, 2.

PROMISSORY NOTES. See BILLS AND NOTES. CORPORATIONS, 4, 5.

PROMOTERS. See CORPORATIONS, 1–3.

PROXIMATE CAUSE. See MASTER AND SERVANT, 4, 6. MUNICIPAL CORPORATIONS, 24, 25.

PUBLIC IMPROVEMENTS: Assessment of benefits, etc. See MUNICIPAL CORPORATIONS, 3–13.

PUBLIC LANDS. See STATUTES, 2.

PUBLIC POLICY. See CORPORATIONS, 7. MONOPOLIES. MUNICIPAL CORPORATIONS, 1.

PUBLIC SCHOOLS. See SCHOOLS.

PUNITIVE DAMAGES. See DAMAGES, 1, 2. STREET RAILWAYS, 3, 4.

QUO WARRANTO. See ELECTIONS.

RAILROADS.

Diversion of surface water upon land. See WATERS.

Carriers. See CARRIERS.

Negligence: Injury to traveler on highway: Contributory negligence.

1. Plaintiff's intestate was struck and killed at a street crossing by a passenger train running at an unlawful speed without the statutory signals being given. Upon the evidence — showing, among other things, that the deceased was driving rapidly and as he neared the crossing, with which he was familiar, was urging his horse forward; that although his view down the track was considerably obstructed as he approached, yet from certain points the train must have been in plain sight had he looked; and that as he reached the right of way, fifty feet from the point of collision, a mere glance would have disclosed to him his peril — it is *held*, as matter of law, that he was guilty of contributory negligence either in failing to look or in attempting to cross in front of the train with knowledge of its approach. *Koester v. C. & N. W. R. Co.* 460

2. An engine and caboose which, shortly before the accident, the deceased might have seen starting from the station in the direction whence the train afterwards came, and which had passed down a side-track over the crossing in question and stopped in plain view for a considerable distance as he approached the tracks, is *held* not to have constituted such a diversion of his attention or such an assurance that no train was coming from that direction as would make the question of his negligence one for the jury. *Ibid.*

Injury to employee: Negligence of co-employee: "Operating" train.

3. Plaintiff, a railway conductor, while standing by the door of a freight car which, in pursuance of his duty, he had caused to be put into his train and drawn up before the freight depot to be unloaded, was struck and injured by a long, heavy bale of felt carelessly and

negligently handled by co-employees engaged in unloading the car. It was his duty to see that the door of the car was closed and fastened when the unloading was completed, and to signal the engineer, and he was also watching an open switch connecting with the main line. *Held*, that at the time of the accident he was not engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the meaning of sec. 1816, Stats. 1898, providing that a railway employee so engaged, in the performance of his duty, may recover for injuries caused by the negligence of a co-employee in the discharge of, or in failing to discharge, his duties. DODGE and WINSLOW, JJ., dissent. *Medberry v. C., M. & St. P. R. Co.* 191

REAL PROPERTY. See ACTION, 4–7. ADVERSE POSSESSION. CORPORATIONS, 1–3, 8–12. DEEDS. EQUITY. FRAUD. FRAUDULENT CONVEYANCES, 7. HIGHWAYS. JUDGMENT, 5, 6. LANDLORD AND TENANT. LIENS, 1. MORTGAGES. MUNICIPAL CORPORATIONS, 9–13. RELIGIOUS SOCIETIES, 3, 4. STATUTES, 2. TAX TITLES. TELEGRAPHS. WATERS.

REASONABLE DOUBT. See CRIMINAL LAW, 8, 9.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 6, 7.

RECEIVERS. See BANKS AND BANKING, 1. CORPORATIONS, 11.

RECORD on appeal. See APPEAL, 6–11.

RECOUPMENT. See SALE OF CHATTELS, 2–5.

REFERENCE.

Findings of fact by a referee appointed to hear and decide the whole issue should be set aside by the trial court if they are against the clear preponderance of the evidence, even though there may be some evidence to support them. A remark in *Briggs v. Hiles*, 87 Wis. 447, that such findings have the effect of a verdict of a jury, overruled. *Johnson v. Goult*, 247

RELIGIOUS SOCIETIES.

1. Where incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith, no notice of the intent to so organize, or of the time or place of forming the organization, is necessary under sec. 1990, Stats. 1898. *Franke v. Mann*, 118

2. In a *bona fide* attempt to comply with the statute authorizing the formation of religious corporations, articles were drawn and signed in proper form except as to the acknowledgment, and were recorded, and the corporation was organized by the election of trustees, and the right to exercise the franchise of being a corporation asserted, and such franchise used in good faith for a number of years without objection. *Held*, that although no notice of the purpose to organize a corporation was given pursuant to sec. 1990, R. S. 1878, there was a corporation *de facto* at least, the legality of whose organization cannot be questioned in a controversy between its members as to the uses to which its property shall be put. *Ibid.*

3. In an action by members of a religious corporation to restrain diversion of its property from its legitimate use, findings of the trial court to the effect that the corporation had been organized as a society of a certain church or sect, and that the property had been deeded to its trustees for its use in harmony with the purposes of its organization, are *held* to be sustained by the evidence. *Ibid.*

4. Where a religious society is organized as a corporation of a certain church or sect, under the jurisdiction and government of a synod, land conveyed to its trustees for church purposes is held in trust for that particular use, and its diversion by such trustees, even by the will of a majority of the members of the society, to other and inconsistent uses (such as the uses of a different sect) will be restrained at the suit of the minority. *Ibid.*

REMEDIES.

See ACTION. APPEAL, 5. CORPORATIONS, 16–27. ESTATES OF DECEDENTS, 3, 4. MUNICIPAL CORPORATIONS, 5.

Where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction. *Finney v. Guy.* 256

RESCISSION. See PARTNERSHIP, 1. SALE OF CHATTELS, 11.

RESTRAINT OF TRADE. See MONOPOLIES.

RETURN on appeal. See APPEAL, 6–8.

REVERSAL. See APPEAL, *Affirmance and reversal.*

REVIEW on appeal. See APPEAL, 11–18.

REVOCATION of will. See WILLS.

ROADS AND STREETS. See HIGHWAYS. LOGS AND LOGGING, 2, 3. MUNICIPAL CORPORATIONS, 3–25. TELEGRAPHS.

RULES OF COURT.
Circuit Court Rule XI (Motions and orders: Papers), 335.
County Court Rule XIII, sec. 6 (Claims: Limitation), 387.

SALARIES. See MUNICIPAL CORPORATIONS, 1, 2.

SALE OF CHATTELS.

See CONTRACTS.

1. In replevin for goods which had been shipped by plaintiff to defendant's assignor, the question whether they had been sold to said assignor or merely consigned to him for sale as plaintiff's agent is *held*, on the evidence, to have been one for the jury. *Conrad v. Kelley.* 252

2. The vendor of vehicles warranted "wheel, spring, and axle," and agreed to replace or repair them if defective on account of material or workmanship, and also warranted the paint not to peel or flake. There was no stipulation that the vendee should return or offer to return defective parts, nor for the trial of the vehicles within a limited time, nor for notice of defects, nor for an opportunity to replace or repair, nor for rescission, nor for waiver by conduct. *Held*, that in case of a breach of the warranty by reason of latent defects the vendee might, without notifying the vendor thereof, retain the defective vehicle and, if sued for the price, recoup his damages for such breach. *Parry Mfg. Co. v. Tobin,* 286

3. The warranty of wheel, spring, and axle covered only "private vehicles" and was for one year only, but the warranty of the paint was not so limited. *Held* that, recoupment being sought in an action for the purchase price, the court properly refused to instruct the jury that they must not consider any evidence of defects observed over a year from the date of shipment, and that they must exclude all damages on account of defects in vehicles which the vendee had sold to liverymen for public use. *Ibid.*

4. In such action the admission of testimony on behalf of defendant as to defects not covered by the warranty was a material error, and was not cured by an instruction that damages could be allowed only for the defects warranted against. *Ibid.*

5. The proper measure of damages for breach of warranties of vehicles sold is the difference between their actual value at the place of delivery and the value they would have possessed there had they been as warranted. *Ibid.*

6. On May 27th, plaintiffs' agent took from defendant an order for flour, subject to plaintiffs' approval, "to be shipped out any time between now and July 1st, when ordered by" defendant — "terms, thirty days from shipment." On the same or the next day plaintiffs replied by letter accepting the order but specifying, as the terms, that the flour was "to be shipped some time in June . . . on thirty days acceptance without interest, and if longer time wanted eight per cent. interest after thirty days." *Held*, that this was a material modification of the terms of the order, and therefore constituted a new offer, not binding on the defendant until accepted. *Russell v. Falls Mfg. Co.* 329

7. In such a case, mere silence on the part of the vendee after receipt of the vendors' response could not be construed as an acceptance of their modified proposal. *Ibid.*

8. If machines manufactured under a contract according to a model furnished by the vendee are sent out to dealers in a defective condition with the knowledge and consent of the vendee, he cannot hold the manufacturer responsible in damages for their failure to work; and if the vendee takes them and, with full opportunity for examination and knowledge of the variance between the machines contracted for and the ones furnished, fails to give the manufacturer timely notice that he does not accept them as being in compliance with the contract, the defects will be deemed waived. *J. Thompson Mfg. Co. v. Gunderson*, 449

9. Under a contract providing for the manufacture of a certain number of tobacco transplanting machines according to a model, except that the shoes were to be of steel instead of cast iron, and containing a stipulation that the manufacturer did not guarantee them to work and that the vendee assumed the risk, no implied warranty arose that the steel to be used for the shoes and gatherers should "scour in the soils of this country." The law merely implied an obligation that the manufacturer should use reasonable care in the selection of materials, and that, so far as its efforts entered into the manufacture of the materials there should be no latent defect in either materials or workmanship. Remarks in *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, limited. *Ibid.*

10. If the vendee retained the machines without any offer to return them he assumed the burden of showing that they were worthless: and the manufacturer could recover their actual value, notwithstanding they were totally unfit for the use for which they were made, less such special damages as the vendee had properly pleaded and proved. *Ibid.*

11. The general rule, that if a sale or agreement be made by means of fraud, the injured party, not being guilty of laches sufficient to estop him, may rescind the same and treat the agreement or sale as void upon condition of his restoring the wrongdoer to his former position, is subject to this exception, among others: If the defrauded person, by reason of the wrongful conduct of the wrong-

doer, is rendered incapable of fully restoring the latter to his former position, to that extent such restoration is not necessary to a rescission of such sale or agreement. *Gates v. Raymond,* 657

SALE OF LAND. See ADVERSE POSSESSION, 4. CORPORATIONS, 1–3, 8–12. DEEDS. EQUITY. FRAUD. FRAUDULENT CONVEYANCES, 7. MORTGAGES. STATUTES, 2. TAX TITLES.

SCHOOLS AND SCHOOL DISTRICTS.

1. Under sec. 432, Stats. 1898 (providing that no act authorized to be done by the school board shall be valid unless voted at its meeting), a contract which was never authorized by any vote or at any meeting is void, although signed by all the members of the board. *Manthey v. School District,* 340

2. Under sec. 418, Stats. 1898 — providing that "whenever the town board shall contemplate the alteration of a school district they shall give" notice to the clerks of the districts affected — the board acquires no jurisdiction to make the change unless the giving of such notice be authorized at a meeting of the board duly held. *State ex rel. Graff v. Steele,* 475

SEALED VERDICT. See VERDICT, 5.

SERVICE OF SUMMONS. See APPEAL, 1. CONSTITUTIONAL LAW. JUDGMENT, 1, 2.

SETTLEMENT of action. See ATTORNEYS, 1, 2. JUDGMENT, 7.

SHEEP: Killing by dogs. See ANIMALS.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 14, 15, 21–25.

SPECIAL VERDICT. See MUNICIPAL CORPORATIONS, 16, 17, 23. VERDICT.

STARE DECISIS.

See CORPORATIONS, 14. STATUTES, 1.

The rules of law declared and the conclusion drawn therefrom by this court in an action by a wife alone for personal injuries must control, on the ground of *stare decisis*, in an action by the husband to recover for the same injuries, in so far as there is substantial identity in the material facts. *Cawley v. La Crosse C. R. Co.* 239

STATUTE OF FRAUDS. See ADVERSE POSSESSION, 4.

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Constitutionality. See CONSTITUTIONAL LAW. CRIMINAL LAW, 15. JUDGMENT, 8.

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1. When a statute, requiring judicial construction, has received it by the highest court having jurisdiction in that regard, and such construction has been firmly established as correct, it is as much a

part of the statute as if plainly written into it originally, and the court may properly decline to consider, thereafter, the subject of whether such construction was right or wrong. *Eau Claire Nat. Bank v. Benson*, 624

Federal and state statutes. See VOLUNTARY ASSIGNMENT.

Mandatory or directory? See COUNTIES, 3.

Special provisions prevail over general ones. See MUNICIPAL CORPORATIONS, 13 (3). OFFICERS, 3. STATUTES, 3.

Revision and repeal: Special statute.

2. The continuation in the Statutes of 1898 of the general provision of the Revised Statutes of 1878 relating to the sale of swamp lands, and the repeal of all acts or parts of acts inconsistent with the new statutes, did not repeal a special statute (ch. 367, Laws of 1897), taking particular lands out of the control of such provision. *State ex rel. Gates v. Commissioners of Public Lands*, 584

Suspension of operation of insolvency laws. See VOLUNTARY ASSIGNMENT.

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STOCK AND STOCKHOLDERS. See BANKS AND BANKING. CORPORATIONS, 16–27. FRAUDULENT CONVEYANCES, 2.

STREET RAILWAYS.

1. A motorman on an electric street car has a right to expect that the driver of a carriage who is turning towards the track in front of his car will desist from so doing when warned by the gong of the

car, and is not bound, as an ordinarily careful man, to exert efforts to stop his car until after it becomes apparent that the warning is unheeded. *Cawley v. La Crosse C. R. Co.* 239

2. One who, with her ears muffled in a fur cap and coat, drove upon and along the track of an electric street railway for the purpose of passing a wagon, without looking back along the track more than 120 feet, was guilty of contributory negligence precluding a recovery for her injuries caused by a car striking the buggy from behind. *Ibid.*

3. Plaintiff, accompanied by a young lady, tendered a genuine half dollar in payment of street-car fares, which was accepted and the proper change returned. Subsequently the conductor, from the peculiar appearance of the coin, came to the conclusion that it was counterfeit, and tendered it back to the plaintiff and told him to get off or pay again. Plaintiff testified that upon his refusal to do so the conductor took hold of him by the collar and pulled, and that he then got up and walked out peaceably, the young lady accompanying him; and that the conductor spoke harshly and loudly, attracting the attention of the other passengers. Plaintiff had other money in his pocket. In an action to recover for such ejection, the evidence (more fully stated in the opinion) is *held* insufficient to warrant a finding by the jury that the plaintiff was ejected "under circumstances of aggravation, insult, or cruelty," or "with vindictiveness or malice." An instruction authorizing them to award punitory damages was therefore error. *Vassau v. Madison Electric R. Co.* 301

4. Evidence in such case — to the effect that when plaintiff reported the matter to defendant's superintendent the latter told him that the conductor was one of the oldest on the line, and the company would stand by what he did; that he had the power to protect the company's property — a right to put plaintiff off; and that the matter should be looked up to ascertain whether the coin was counterfeit — is *held* insufficient to show that the superintendent authorized or ratified any aggravating, insulting, cruel, vindictive, or malicious conduct on the part of the conductor. *Ibid.*

5. It was error, in such case, to refuse to instruct the jury that "in considering the question whether there was any injury to the feelings of plaintiff, you have the right to consider his conduct and that of the conductor, and, among other things, whether or not the plaintiff sought to avoid trouble, or whether his conduct was such as tended to provoke and cause trouble unnecessarily." *Ibid.*

STREETS AND ALLEYS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 3–25. TELEGRAPHS.

SUBCONTRACTORS. See LIENS, 1.

SUBSCRIPTIONS to stock. See CORPORATIONS, 24, 25.

SUBSTITUTION of parties. See ACTION, 3.

SUMMONS: Service. See APPEAL, 1. CONSTITUTIONAL LAW. JUDGMENT, 1, 2.

SUPREME COURT. See APPEAL AND ERROR. MANDAMUS.

SURFACE WATERS. See WATERS.

SURVIVAL OF ACTIONS. See ACTION, 1, 2, 4, 5. BANKS AND BANKING, 9. CORPORATIONS, 13.

SWAMP LANDS. See STATUTES, 2.

TACKING. See ADVERSE POSSESSION, 4.

TAXATION.

See MUNICIPAL CORPORATIONS, 13 (4–6).

1. A village had for some years collected taxes independently of the town within whose limits it was situated. The separate property statements of the town and village clerks being before the county board, and a doubt having arisen as to whether the village had been legally incorporated, the assessment of relative values was made separately for "that part of the town not included in the village" and "that part of the town included in the village," and the state and county taxes were apportioned accordingly. The county clerk refused to deliver to the village clerk any statement of the taxes so apportioned to it, but attempted to deliver the same to the town clerk, and the result was that the village paid no part of said taxes for that year, nor were the same paid by the town. In the following year the county board charged back the said taxes to the town as an arrearage, with the penalty prescribed by sec. 1163, Stats. 1898, and the amount thereof was certified to the town clerk, who carried it into the tax roll, and it was collected and paid by the town. In an action by the town against the village to recover the amount so paid, it is *held* that the county board had no authority to charge the arrearage of the village to the town, and, the village not having requested the town to pay it, the payment was purely voluntary and there can be no recovery. *Milwaukee v Whitefish Bay,* 25

2. Sec. 1114, Stats. 1898 (providing that the county treasurer shall credit the amount of delinquent taxes to the town treasurer, and that such delinquent taxes shall belong to, and be collected for the use of, the county, "but if such delinquent taxes exceed the sum then due the county for unpaid county taxes such excess, when collected . . . shall be returned to the town treasurer for the use of the town"), precludes recovery of delinquent taxes by the town from the county, until collection in excess of the unpaid county taxes is in fact made. *Iron River v. Bayfield Co.* 587

3. No presumption arises that taxes on lands, returned as delinquent, have been collected by the county. *Ibid.*

4. The purchase of lands at a tax sale, enjoined upon the county treasurer by sec. 1138, Stats. 1898, in case the land cannot be sold for the amount due, is merely a step towards collection, and is not a collection, of the tax within the meaning of sec. 1114. [Whether the taking of tax deeds by the county would bear a different aspect, not determined.] *Ibid.*

TAX TITLES.

1. The purchase of a tax certificate by a junior mortgagee amounts to the payment of the tax for the protection of the estate, and for the mutual benefit of the mortgagees and the mortgagor; and under sec. 1158, Stats. 1898, the purchaser acquires simply a "further lien" upon the land of the same nature as his mortgage and constituting simply an addition to the mortgage debt of the amount due on the certificate when he acquired it. *Hill v. Buffington,* 525

2. In an action to foreclose a first mortgage on real estate the complaint alleged that the premises had been sold for the taxes of 1893 and that the sale was unredeemed, but failed to allege that the

lien therefor was subject to plaintiff's mortgage, or that plaintiff's mortgage was prior to the claims of a second mortgagee, although he knew that the latter held the certificate for such taxes. Judgment was entered by default, and the plaintiff bid in the premises and acquired title thereto. Subsequently he commenced an action against the second mortgagee, under sec. 3186, Stats. 1898, to set aside said tax certificate as a cloud upon his title. *Held*, that the plaintiff was estopped from claiming that the foreclosure judgment affected the defendant's equitable rights in respect to the tax certificate. *Ibid.*

3. Notwithstanding the fact that defendant's tax certificate was not a lien paramount to plaintiff's mortgage and after the foreclosure of that mortgage, could not be enforced in any way, a court of equity should not set it aside as a cloud on the title except upon condition that plaintiff reimburse defendant for his expenditure by reason thereof which inured to plaintiff's benefit. *Ibid.*

[4. CASSODAY, C. J., is of the opinion that reimbursement for defendant's expenditures by reason of the tax certificate was properly required as a condition of setting it aside, on the ground that it was a lien in equity paramount to plaintiff's mortgage.] *Ibid.*

TELEGRAPHS AND TELEPHONES.

1. Sec. 1778, Stats. 1898, giving to telegraph companies (including telephone companies) the right to construct and maintain their lines upon and along highways, grants no power to use the highway except as against the public, and was not intended to cut off or limit the rights of the actual owners of the land affected thereby. *Krueger v. Wis. Tel. Co.* 96

2. The compensation paid to the owners of land over which highways have been laid out since the enactment of the above-mentioned statute in 1848 (Terr. Laws of 1848, p. 257) did not cover the use to which such highways might be put by telegraph and telephone companies, their occupancy of portions of the highway being a permanent occupancy of the land, independent of the public use, for the direct benefit of private corporations, and not one which can fairly be said to have been within the contemplation of the parties. *Huston v. Fort Atkinson*, 56 Wis. 350, distinguished. *Ibid.*

3. The occupancy of a portion of a highway by the poles and other structures of a telephone line constitutes an additional servitude, as against the owner of the land, which cannot be imposed without his consent, nor without compensation if he requires it. *Ibid.*

4. The erection and maintenance of a telephone pole in the street in front of the show window of a store building, interfering with the proper use and enjoyment of the property, is a continuing trespass upon the land, and a nuisance which a court of equity will abate. *Ibid.*

TERMS.
Of office. See OFFICERS, 3.
Of amendment. See PLEADING, 2, 3.

TITLE to land. See ACTION, 4-7. ADVERSE POSSESSION. DEEDS. EQUITY. FRAUD. FRAUDULENT CONVEYANCES, 7. HIGHWAYS. RELIGIOUS SOCIETIES, 3, 4. TAX TITLES. TELEGRAPHS.

TOWNS. See TAXATION.

TRADES UNIONS. See MONOPOLIES.

TRANSCRIPTED JUDGMENTS. See EXECUTIONS.

TRESPASS. See TELEGRAPHS, 4.

TRIAL. See PRACTICE.

TRUST-FUND doctrine. See BANKS AND BANKING, 8.

TRUSTS AND TRUSTEES. See ACTION, 4, 7. ATTORNEYS, 8. BANKS AND BANKING, 8, 7–9. MUNICIPAL CORPORATIONS, 13 (5). RELIGIOUS SOCIETIES, 3, 4.

UNDUE INFLUENCE. See DEEDS. WILLS.

UNITIES of interest, time, etc. See VERDICT, 4.

VENDOR AND PURCHASER OF LAND. See CORPORATIONS, 2, 8–12. DEEDS. FRAUD. FRAUDULENT CONVEYANCES, 7.

VERDICT.

See COURT AND JURY, 2. MUNICIPAL CORPORATIONS, 16, 17, 23. PRACTICE.

1. Under sec. 2858, Stats. 1898, the right to a special verdict is absolute if the request therefor is made before any argument to the jury, and it is the duty of the trial court to prepare the form therefor. Where, therefore, a special verdict was seasonably requested and the court stated that counsel might prepare the questions, it was error, after the argument, when the request was renewed and the questions submitted for approval, to deny the request on the ground that it came too late. *Gatzow v. Buening*, 1

2. Denial of a request for a special verdict was not a material error where the facts were admitted or established by the evidence without reasonable controversy, leaving nothing to submit to the jury except the amount of the damages. *Ibid.*

3. The form of a question in a special verdict is very largely in the discretion of the court; and if that adopted fairly calls for the conclusion of the jury upon the material issue of fact, the discretion of the court should not be disturbed. *Dodge v. O'Dell's Estate*, 296

4. The unities of interest, time, title, and possession in the ownership of an indebtedness for support result by operation of law from a joint participation in furnishing the support during the period covered by the claim. A question of a special verdict whether the parties participated jointly in furnishing the support was therefore sufficient to cover the question of joint ownership of the claim. *Ibid.*

5. A direction to the jury that if they agreed before the next morning at 9 o'clock they should seal their verdict and hand it to the officer in charge, but not to report to the court until the day after, thus skipping a day when the court was in session, is criticised. Whether it was an abuse of discretion in this case, not determined. *Bergeron v. Peyton*, 377

6. Where a special verdict fails to cover a material controverted issue the defect is not waived by failure to request the submission of a proper question. *Hildman v. Phillips*, 611

7. If a question as to whether the defendant was guilty of negligence which was the proximate cause of plaintiff's injury is answered in the affirmative, there is no duplicity of which the defendant can complain. *Brunette v. Gagen*, 618

VESTED RIGHTS. See APPEAL, 4, 5.

VILLAGES. See TAXATION, 1.

VOLUNTARY APPEARANCE. See JUDGMENT, 2.

VOLUNTARY ASSIGNMENT.

See BANKS AND BANKING, 9. CORPORATIONS, 24, 25.

1. The mere enactment of the federal bankruptcy act of 1898 did not *ipso facto* suspend the operation of all state insolvency laws, or prevent the making of a voluntary assignment for the benefit of creditors, especially under a state law like ch. 80, Stats. 1898, which prohibits preferences except for six months' wages of employees,—although such an assignment would be voidable by proceedings under the bankruptcy act. *Binder v. McDonald*, 332

2. Under sec. 1694*a*, Stats. 1898 (providing that all attachments levied within ten days prior to the making of a voluntary assignment shall be dissolved and the property turned over to the assignee or receiver), our state courts still have jurisdiction, if there have been no proceedings in bankruptcy under the federal act, to determine a motion by the assignee to dissolve such an attachment. *Ibid.*

3. Not the whole of ch. 80, Stats. 1898, is to be regarded as an insolvency law, but only certain features thereof. Remarks in *Holton v. Burton*, 78 Wis. 326, and *Second Ward S. Bank v. Schranck*, 97 Wis. 258, limited. *Ibid.*

4. The right to make a voluntary assignment for the benefit of creditors, when not forbidden by statute, is inherent in a corporation as well as in an individual, and exists independent of the insolvency features of ch. 80, Stats. 1898. *Ibid.*

VOLUNTARY CONVEYANCE. See FRAUDULENT CONVEYANCES, 8.

VOLUNTARY PAYMENT. See TAXATION, 1.

WAIVER.
Of errors. See APPEAL, 12, 14, 21.
Of defects in appeal bond. See APPEAL, 25.
Of objection to action in equity. See EQUITY, 8.
Of defense. See INSURANCE, 1.
Of lack of jurisdiction. See APPEAL, 25. JUDGMENT, 2.
Of objections to jurors. See APPEAL, 21. JURORS, 2.
Of lack of notice. See LIMITATION OF ACTIONS, 2, 3.
Of defect of parties. See PARTIES.
Of defects in goods. See SALE OF CHATTELS, 8.
Of defect in verdict. See VERDICT, 6.

WARRANTY. See INSURANCE, 1. SALE OF CHATTELS, 2–5, 9.

WATERS.

1. By reason of the lowering of the grade of a railroad, surface water which came upon the right of way from adjoining low lands could no longer be conducted on its natural course by culvert under the track, and was disposed of by conducting it in an ordinary ditch along the side of the roadbed for about half a mile and through a cut to a lower level on the railroad lands, where it spread out, some of it flowing upon plaintiff's land and carrying sand and gravel thereon. *Held*, that such alteration of the flow of the water must be regarded simply as an incident necessarily following the ordinary and lawful use and improvement of the railroad property, and that for the resulting injury to plaintiff's land there is no redress. *Clauson v. C. & N. W. R. Co.* 308

2. A "borrow pit" upon the right of way, through which the ditch ran but which did not increase or affect the flow of the water, is

held not to be a "pond" or "reservoir" within the meaning of the rule, laid down in *Pettigrew v. Evansville*, 25 Wis. 223, and other cases, that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it by artificial channel directly upon or in close proximity to the land of another, materially to his injury. *Ibid.*

WILLS.

See GUARDIAN AND WARD, 2.

1. The fact that a testator seventy-five years old, of sound and disposing mind, consulted with his wife, then in her last illness, and was influenced by her in the making of his will, which practically disinherited some of their children, is not a sufficient reason for setting aside the will, especially where the testator lived and retained his testamentary capacity for more than three years after his wife's death but did not change his will. *Deck v. Deck*, 470
2. Sec. 2290, Stats. 1898, points out the only way in which a will may be revoked: a desire expressed by the testator to make other disposition of his property or to change his will will not effect a revocation. *Ibid.*

WITNESSES.
Competency. See CRIMINAL LAW, 4.
Impeachment. See CRIMINAL LAW, 2, 3, 7.

WORDS AND PHRASES.
Actual and *compensatory* damages. See DAMAGES, 1.
Collection of tax, in statute. See TAXATION, 4.
Damages done to real and personal estate, in statute. See ACTION, 2.
Dangerous weapon, in statute. See CRIMINAL LAW, 11.
Defect in street. See MUNICIPAL CORPORATIONS, 17.
Disallowance of claim. See COUNTIES, 5, 8.
Due process of law, in constitution. See CONSTITUTIONAL LAW.
Estate or interest in land, in statute. See ADVERSE POSSESSION, 4.
Injury to the person, in statute. See LIMITATION OF ACTIONS, 1.
Insolvency. See FRAUDULENT CONVEYANCES, 5.
Man, in statute. See CRIMINAL LAW, 16.
Operating a train, in statute. See RAILROADS, 8.
Ordinary care. See MUNICIPAL CORPORATIONS, 19.
Pond or *reservoir*. See WATERS, 2.
Presentation of claim, in statute. See MUNICIPAL CORPORATIONS, 26.
Probable cause. See MALICIOUS PROSECUTION, 3.
Self-executing provision. See CORPORATIONS, 20.
Year, in statute. See OFFICERS, 3.

WRIT.
Of *certiorari*. See JUSTICES' COURTS.
Of execution. See EXECUTIONS.
Of *mandamus*. See MANDAMUS.

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